Petition

81-1485

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No. .....
IN THE

Supreme Court of the United States

October Term, 1981

GRIFFITH COMPANY, J. W. NICKS CONSTRUCTION CO. and SECURITY PAVING CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.*

1. Does the existence of a collective bargaining relationship between a construction union and a construction employer invariably legalize a secondary boycott agreement that pressures a union-signatory subcontractor to comply with the terms of its collective bargaining agreement with the same union?
2. Did the Court of Appeals misapply this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975) in holding that the construction industry proviso to Section 8(e) of the Act (29 U.S.C. 158(e)) legalizes broad secondary boycott agreements not designed to eliminate friction between union and non-union workers on the same job site nor to regulate working conditions at the boycotting employer at that job site?
3. Where a secondary boycott agreement provides for enforcement by strikes and picketing resulting in the extraction of payments to a trust fund by an employer, is that employer entitled to restitution of those monies?
4. Did the Court of Appeals err in failing to find that the Union, through its trust funds, threatened, coerced and restrained Petitioners within the meaning of Section 8(b)(4)(B) of the Act?

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*The questions presented in this case are similar to those in the consolidated cases of *Woelke & Romero Framing, Inc. v. National Labor Relations Board*, No. 80-1798; *Pacific Northwest Chapter of Associated Builders & Contractors Inc. v. National Labor Relations Board*, No. 80-1808; and *Oregon-Columbia Chapter, Associated General Contractors of America v. National Labor Relations Board*, No. 81-91, cert. granted October 5, 1981, ___ U.S. ___, 50 U.S.L.W. 3215.

List of Parties to Proceeding Below.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted.

The caption of the within matter contains a listing of the names of all parties in the proceeding below which was numbered Case Nos. 79-7397 and 80-7103 in the U.S. Court of Appeals for the Ninth Circuit; except that the full names of the four operating engineer trust funds are: Operating Engineers Health & Welfare Fund; Operating Engineers Pension Trust; Operating Engineers Vacation-Holiday Savings Trust; and Southern California Operating Engineers Apprentice Training Trust.

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NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS, OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Griffith Company, J.W. Nicks Construction Co., and Security Paving Co., Inc., respectfully pray that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on December 8, 1981.[1]

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 29:

§158(e)

"It shall be an unfair labor practice for any labor organization and any employer to enter into any con-

[1]The within matter was numbered Case No. 79-7394 in the Court of Appeals. The National Labor Relations Board was the Respondent below. The Union and the four trust funds were Intervenors below.

tract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

§158(b)(4)(i) and (ii)(B)

"It shall be an unfair labor practice for a labor oganization or its agents—(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person. . . ."

OPINIONS AND ORDERS BELOW.

The judgment and opinion of the panel of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this case on December 8, 1981 is officially reported at 660 F.2d

406 (1981). It appears as Appendix A. By Order filed December 14, 1981, the Ninth Circuit stayed its mandate until 15 days following the Court's decision in the consolidated cases of *Woelke & Romero Framing, Inc. v. NLRB*, No. 80-1798; *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, No. 80-1808; and *Oregon-Columbia Chapter, Associated General Contractors of America v. NLRB*, No. 81-91, cert. granted October 5, 1981, ___ U.S. ___, 50 U.S.L.W. 3215.

The Supplemental Decision and Order of the National Labor Relations Board ("Board") which was reviewed by the U.S. Court of Appeals for the Ninth Circuit pursuant to a Petition for Review filed under 29 U.S.C. §160(f) is officially reported at 243 NLRB No. 153 (1979), and appears as Appendix B.

In prior proceedings the U.S. Court of Appeals for the Ninth Circuit and the Board addressed other issues involved in this matter. The Ninth Circuit's prior opinion is officially reported at 545 F.2d 1194 (1976), certiorari denied sub nom. *Waggoner et al. v. Griffith Company et al.*, 434 U.S. 854 (1977). This opinion appears at Appendix C. The Board's opinion in these earlier proceedings is officially reported at 212 NLRB 343 (1974). It, as well as the consolidated dissenting opinion of Board member Kennedy and Chairman Miller, appears at Appendix D.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the panel of the U.S. Court of Appeals for the Ninth Circuit was entered on December 8, 1981. No petition for rehearing, or for further hearing *en banc*, has been filed.

The U.S. Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). See, 29 U.S.C. §§160(f) and 160(e).

STATEMENT OF THE CASE.

Statement of Facts.

The three Petitioners, Griffith Company, J.W. Nicks Construction Co. and Security Paving Co., Inc. (Griffith), are general construction contractors in southern California. Each is a member of a construction industry trade association which, jointly with two similar associations, negotiated a Master Labor Agreement effective July 1, 1969 to July 1, 1974, with the International Union of Operating Engineers, Local Union No. 12 (Union). The agreement covers hours, wages and working conditions for employees represented by the Union in eleven southern California counties. A large number of other employers have individually negotiated "short form" agreements with the Union which incorporated by reference most of the terms and conditions of the Master Labor Agreement.

These agreements obligate the employers to make specified contributions to four employee fringe benefit trust funds created pursuant to 29 U.S.C. §185(c)(5). These trust funds collect approximately $5 million per month from over 2,500 employers for the benefit of 40,000 employees. The employer contributions to the individual trust funds are "pooled" in the sense that the gross income is received and disbursed from one bank account. The Pension, Health and Welfare and Vacation Trusts maintain individual account records for each person having contributions made on his behalf. The trust funds credit these individual accounts as the hours are reported, so that the individual employee's eligibility for benefits may readily be determined. (Pet. App. C, p. 30).[2]

From time to time some employers fail to pay the trust funds on time or at all. One such employer was a group of

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[2]The Appendix herein will be cited to as "Pet. App." followed by a reference to the appropriate appendix and page number.

companies called Urban Pacific. This company received subcontracts from each of the Petitioners.

Over the years, delinquent employer contributions have been a significant problem. All four trust funds have experienced some financial difficulty and some have had to reduce benefits. The trusts have implemented a number of means to deal with delinquencies.

Once a delinquent employer is discovered and after informal settlement attempts have failed, the employer's name is placed on a delinquency list which is circulated to signatory employers. Article I, Paragraph B-15 of the Master Labor Agreement (Paragraph 15) then provides that no employer shall subcontract any part of a job to any subcontractor on the delinquency list until such subcontractor has paid the delinquent amounts. Paragraph 16 provides that if an employer does subcontract to a delinquent subcontractor in violation of Paragraph 15, then the employer is liable for the delinquency. If a subcontractor becomes delinquent after commencing work, the employer is liable for the delinquency and must terminate the subcontract. If the employer does not pay the amounts due, the Union is given the right to withhold services.[3]

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[3]These parts of the contract read as follows:

15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V of the Agreement.

16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Con-

(footnote continued on following page)

In early 1973, the trustees learned that Urban Pacific, a contractor who had signed a short form agreement with the Union and who was on the delinquency list, was doing subcontract work for Griffith and others. The administrator of the trust funds notified these contractors that they were liable for the delinquencies under the Master Labor Agreement. The contract breaches by Urban Pacific in failing to make trust fund payments and file reports occurred many months and indeed in some cases years prior to the time that Petitioners dealt with Urban Pacific. The sums demanded by the Trust Funds from Petitioners included these past amounts. Urban Pacific's subcontract at the Griffith Company job site had been completed several months prior to the administrator's demand for payment.

Two of the contractors paid part of the delinquency as demanded by the administrator. Griffith and some of the others chose to resist. In March 1973, the Trust's attorney by telephone, advised Griffith that if the delinquencies of Urban Pacific were not paid the trusts would officially notify the Union of its right to strike each of Petitioner's job sites then in progress. Part of the delinquency remaining unpaid, the administrator notified the Union that it had the right to withhold services from Griffith and the others who had not paid. (Pet. App. C, p. 32).

As part of their resistance effort Griffith and others filed unfair labor practice charges with the NLRB charging that Paragraphs 15 and 16 of the Master Labor Agreement constituted an agreement to cease doing business with another

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tractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor. (Pet. App. C, p. 31).

employer in violation of Section 8(e) of the National Labor Relations Act (Act), as amended, 29 U.S.C. §158(e), and that the threats to strike violated Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. §158(b)(4)(ii)(B).

On petition of the Regional Director of the NLRB, the U.S. District Court for the Central District of California issued an injunction pursuant to Section 10(1) of the Act. Subsequently, however, the District Court *sua sponte* dissolved the injunction that had prohibited Local 12 from striking Griffith to compel payment of the sums claimed by the Trust Funds. Faced with the loss of this injunction, and the authority of Local 12 to strike all of their projects, the Petitioners paid to the Trust Funds the additional sum of $30,630.87.

Proceedings Below.

On March 8, 1973, the Petitioners and two other contractors filed unfair labor practice charges alleging that the Union had violated Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. §158(b)(4)(ii)(B) by threatening to strike their projects to compel payment of the sums demanded by the administrator of the trust funds. Simultaneously, they filed unfair labor practice charges alleging that the fringe benefit delinquency provisions of the Master Labor Agreement were violative of Section 8(e), 29 U.S.C. §158(e), of the Act. On May 7, 1973 the Board's General Counsel issued a Complaint on the unfair labor practice charges and the matter was heard before an administrative law judge on June 21, and 22, 1973. On September 17, 1973, the administrative law judge issued a Decision in which he dismissed the General Counsel's complaint in its entirety. Thereafter, the General Counsel and the contractors filed exceptions and supporting briefs with the Board. The Union and the Trust Funds filed answering briefs in support of the Administrative Law Judge's decision.

On June 28, 1974, the Board, two members dissenting, issued its first Decision and Order dismissing the complaint in its entirety because it did not regard the conduct and the agreement as "secondary". (Pet. App. D, p. 53).Thereafter, three of the contractors, viz. Griffith Company, J.W. Nicks Construction Co. and Security Paving Co., Inc. petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's decision pursuant to Section 10(f) of the Act, 29 U.S.C. §160(f).

On November 4, 1976, the Ninth Circuit reversed, holding that the agreements and their enforcement were secondary not primary activity. The court remanded the case to the NLRB for consideration of the construction industry proviso issue and the issue of whether or not the contractors were, in fact, threatened or coerced. (Pet. App. C, p. 47). The Union and the Trust Funds petitioned the Court for certiorari which was denied. (434 U.S. 854 (1977)).

The Board through its Executive Secretary requested that the parties file Statements of Position with the Board.[4] These were then filed by the General Counsel, the three contractors, the Union and the Trust Funds. On August 6, 1979, a three member panel of the Board issued a Supplemental Decision and Order in which it held that the clauses were saved from illegality by the first proviso to Section 8(e) of the Act. The Board also held that the conduct of the trust fund's administrator and its counsel did not violate Section 8(b)(4)(ii)(B) of the Act. The Board did, however, find that Article I, Section B, Paragraphs 15 through 16(a) of the Master Labor Agreement was violative of Section 8(e) of the Act because Paragraph 16(a) clearly permitted the Union

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[4]The contractors had asked the Board to reopen the record for the taking of evidence concerning events that had transpired subsequent to the decision of the Administrative Law Judge. When this request was denied *sub silentio*, the Petitioners made an offer of proof to the effect that subsequent events showed that the District Court had dissolved its injunction and that Petitioners had been forced to pay an additional sum of $30,630.87.

to strike signatory contractors if voluntary compliance with the secondary provisions of the agreement were not achieved. (Pet. App. B, p. 23). The Board refused to order restitution of the monies paid by Petitioners to the Trust Funds. The Trust Funds and the Union then moved the Board for a clarification of its decision. In an unreported Order, the Board stated that its Supplemental Decision and Order was intended to hold the clauses unlawful "to the extent" that they contain a contractual right to strike.

Petitioners, again, petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Supplemental Decision and Order pursuant to Section 10(f) of the Act. On October 26, 1981, the United States Court of Appeals for the Ninth Circuit issued an opinion enforcing the Board's Order in its entirety. (Pet. App. A, p. 11). Judgment was entered on December 8, 1981. By Order filed December 14, 1981, the Ninth Circuit stayed its mandate until 15 days following this Court's decision in the consolidated cases of *Woelke & Romero Framing, Inc. v. NLRB*, No. 80-1798; *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, No. 80-1808; and *Oregon-Columbia Chapter, Associated General Contractors of America v. NLRB*, No. 81-91, cert. granted October 5, 1981, ___ U.S. ___ , 50 U.S.L.W. 3215.

The Decisions of the Board and Court of Appeals Below.

In its Supplemental Decision and Order the Board concluded that the construction industry proviso to Section 8(e) of the Act protected the challenged clauses from illegality. In so doing, the Board relied on its own opinion in *Woelke & Romero Framing* (*Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America et al.*), 239 NLRB 241 (1978), which had in turn interpreted this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada*, 421 U.S. 616 (1975). The Board, noting that the Union and the

Petitioners had an established collective bargaining relationship, found no merit to the contention that the challenged clauses were rendered unlawful by this Court's decision in *Connell, id.* The Board noted that the clauses involved in the instant case achieved a somewhat different end from those discussed in *Woelke & Romero, id.* However, the Board found nothing in the expressed language of the proviso itself that indicated the intention of Congress to protect only union-signatory agreements at construction sites. (Pet. App. B, p. 22). As to the request of Petitioners for an affirmative order requiring reimbursement for the payments made to the trust funds as a result of Urban Pacific's delinquencies, the Board said that these payments were not involuntarily extracted by unlawful means but were sanctioned by the collective bargaining agreement. Accordingly, the Board deemed such a reimbursement order inappropriate. (Pet. App. B, p. 25, n. 19). As to the alleged threats of the administrator and trust counsel, the Board viewed them as no more than the vigorous exercise of the fiduciary powers and duties entrusted to them for the sole and exclusive benefit of employees. (Pet. App. B, p. 25). The facts, held the Board, did not give rise to an agency relationship. Therefore, the Board held that the Union did not violate Section 8(b)(4)(ii)(B) of the Act.

The Ninth Circuit based on its own *en banc* opinion in *Woelke & Romero* (*Pacific Northwest v. NLRB*, 654 F.2d 1301 (9th Cir. 1981)) sustained the Board. The court held that the challenged clauses of the Master Labor Agreement served the "community of interest" at the job site and consequently were saved from illegality by the construction industry proviso. The panel opinion observed as follows:

> "When a general contractor engages a subcontractor who is delinquent in his trust fund payments, that subcontractor's employees may engage in a primary strike at the work site. Such a strike can cause exactly the type of dislocation at the job site that the construction

> industry proviso was intended to prevent. Moreover, because contributions to the pension system are pooled into one account, the delinquency of the subcontractor affects the welfare, through the pension benefits, of all employees at the job site." (Pet. App. A, p. 7).

The court further held that agreements entered pursuant to Section 8(e) of the Act were to be enforced judicially rather than by self-help. However, the court refused to void the entire provision holding that only the self help provision was or be deleted as unlawful. (Pet. App. A, p. 8). The court also concluded that the payments by the Petitioners to the trust funds were not exacted by unlawful means and were therefore not subject to reimbursement. It further agreed with the Board's decision to dismiss the Petitioners' claim that they were threatened and coerced within the meaning of Section 8(b)(4)(ii)(B) of the Act.

REASONS FOR GRANTING THE WRIT

Introduction.

On October 5, 1981 this Court granted certiorari to the U.S. Court of Appeals for the Ninth Circuit in three consolidated cases stylized *Woelke & Romero Framing, Inc. v. NLRB*.[5] In those cases the Court will determine if broad union-signatory clauses were intended to be made lawful under the construction industry exception to the general rule forbidding secondary boycott agreements. Under the Ninth Circuit's opinion in *Woelke & Romero*[6] construction unions may with impunity "top down organize" subcontractors.

In this case the subcontractor (primary employer) was at all times signatory to the Union's agreement. Under the Ninth Circuit's opinion here, construction unions may lawfully force general contractors to see to it that the "top-down organized" subcontractor *complies with* the terms of the labor agreement thrust upon it. Thus, the instant case demonstrates the extensiveness of the Ninth Circuit's view of the construction industry proviso and shows that the court does not intend to stop at broad union-signatory clauses. The instant Opinion leaps beyond such clauses[7] to validate the boycotting of even union-signatory employers with

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[5]Hereinafter *Woelke & Romero*. The three cases are: *Woelke & Romero Framing, Inc. v. National Labor Relations Board*, No. 80-1798; *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. National Labor Relations Board*, No. 80-1808; and *Oregon-Columbia Chapter, The Associated Contractors of America, Inc. v. National Labor Relations Board*, No. 81-91.

[6]The three cases were stylized as *Pacific Northwest v. NLRB*, 654 F.2d 1301 (1981) by the Ninth Circuit.

[7]The labor agreement in the instant case also contains a broad union-signatory clause. That clause precludes general contractors from subcontracting any work except to an employer signatory to an agreement with a building trades union affiliated with the AFL-CIO. This broad union-signatory clause is not an issue in this case.

whom the Union may have a mere grievance.[8] In sum, this case presents "top-down organizing" with a vengeance. The construction industry proviso issue is raised here in a different and more aggravated factual context, and therefore would make a proper companion case to *Woelke & Romero*, so that the Court may fully address the complex and significant questions involved.

The labor agreement in this case also authorizes the Union to strike any general contractor who fails to live up to his secondary boycott agreement. This is, of course, directly contrary to this Court's decision in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958). Faced with this unlawful strike provision, Petitioners paid $38,552.52 to the four trust funds. The Ninth Circuit recognized the illegality of secondary boycott agreement because of the strike provision. Nonetheless, the Court refused to find that the payments made were improperly extracted and refused to order reimbursement. Moreover, the Court chose not to find the entire secondary boycott agreement unlawful under Section 8(e) of the Act.

By so doing the Court acted contrary to *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651 (1961) which impliedly held that coercively obtained monies must be reimbursed as part of the unfair labor practice remedy. This is also contrary to the Ninth Circuit's own precedents in *Acco Construction Equipment Inc. v. NLRB*, 511 F.2d 848 (1975) and *Associated General Contractors of California Inc. v. NLRB*, 514 F.2d 433 (1975). It is also inconsistent with the Second Circuit's view. *Cf. Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1193, cert. den., *Sheet Metal Workers' International Association, Local*

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[8]The clauses herein specifically apply when the subcontractor has failed to promptly pay its fringe benefit contributions into the trust funds. Under the broad view taken by the Ninth Circuit a restrictive clause might well require Griffith to boycott any employer who failed to pay wages to its employees; or who hired non-union workers, etc.

28, AFL-CIO v. Carrier Air Conditioning Co. and NLRB, 431 U.S. 974 (1977). (Fines levied by a union through a joint labor-management adjustment board consisting of an equal number of employer and union members "unquestionably coercive").

In addition, the court's refusal to find the entire clause unlawful because of the strike provision is in conflict with that of the U.S. Court of Appeals for the District of Columbia that only a year before had reached the opposite conclusion. *Donald Schriver Inc. v. NLRB*, 635 F.2d 859, 887 (1980), cert. denied ___ U.S. ___, 101 S.Ct. 2058, 68 L.Ed.2d 357 (1981).

These issues too have not yet been specifically addressed by this Court. They represent important matters of federal policy that are ripe for review and resolution by this Court.

ARGUMENT.

The Decision Below Presents Important Questions, Previously Unanswered by This Court, Concerning the Extent of the Validity of Agreements to Conduct Secondary Boycotts in the Construction Industry.

Under the law of the case[9] the agreement herein is a secondary boycott agreement well within the prohibitions of Section 8(e) of the Act. The clauses pressure neutral employers (that have no labor dispute) to force other employers to adhere to their collective bargaining agreements. The tactical object of the agreement is to cause general contractors not to deal with employers who have breached their collective bargaining commitment to make contributions into the trust funds. The agreement and its enforcement benefits members of the Union generally and not just the employees of Griffith Company. In *Griffith I*, the Ninth Circuit rejected the contention that the clauses had sufficient impact on Griffith's employees to warrant an oblit-

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[9]545 F.2d 1194 (9th Cir. 1976), cert. denied 434 U.S. 854 (1977).

eration of the distinction between the separate collective bargaining units involved.

In *Griffith II* below, Petitioners contended that these secondary boycott clauses have nothing whatever to do with the purposes behind the construction industry proviso and that they do not "relate to" the subcontracting of work at the particular Griffith Company job site. Based on its extremely broad opinion in *Woelke & Romero, supra*, the Ninth Circuit offered two, unprecedented justifications for its holding.

Firstly, the Court of Appeals suggests that the maintenance of industry-wide trust funds and the general continuity of employee benefits are interests protected by the construction industry proviso. (Pet. App. A, p. 7). This Court has never identified such broad interests as protected by the proviso. On the contrary the Court in *Connell, supra*, p. 631 identified two narrow employee interests, viz. (1) not having to work side-by-side with non-union workers and (2) the protection of the common employee interest in the general working conditions on the particular job site.[10]

As to the first, it is obvious that the alleviation of job site friction is not served by these clauses. The employees of Griffith are never asked to work side-by-side with non-union employees. The plain fact is that the primary employer, Urban Pacific, was a union-signatory employer, at all times employing Local 12 members.

As to the common interests of the employees of Griffith and employees of Urban Pacific on the Griffith job site, it is readily apparent that Griffith's employees have no interest in the failure, *in the distant past*, of Urban Pacific to pay money owed. While they may have a common interest in

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[10]Congress referred to the protection of the common interests shared by all workers at the common situs as follows: ". . . they work side-by-side and the wages and working conditions of one trade affect all the others." II Leg. Hist. of Labor-Management Reporting and Disclosure Act of 1959, at p. 1577.

Urban Pacific's labor policies on the particular job site where they are working, Griffith's employees have no Congressionally or judicially recognized interest in the working conditions at other job sites where they have not worked.

At the very most, this Court would hold that the proviso shelters secondary boycott agreements that are applicable on particular job sites and which serve the interests of Griffith's employees who may be working at that site along with the employees of Urban Pacific. That interest extends to the working conditions of Urban Pacific's employees on the Griffith job site—but not elsewhere. In marked contrast is the Ninth Circuit's view which would shelter *any agreement* so long as it relates to the general union interest in industry-wide fringe benefit programs. To fully appreciate the extensiveness of the court's holding the applicability of the clauses must be understood. The clauses apply:

(1) Even if Griffith never hired employees covered by the Master Labor Agreement. Thus, Petitioners could have no employees that might theoretically benefit from their payments, yet they could be liable for all of Urban Pacific's delinquencies.

(2) The clauses apply even if Griffith had no operating engineers on the particular job site at which Urban Pacific's employees worked.

(3) The clauses apply even if Griffith sees to it that Urban Pacific actually pays the trust funds for all hours worked on the Griffith job site.

(4) The clauses apply even if Griffith was not signatory to the Master Labor Agreement at the time that Urban Pacific breached its collective bargaining agreement.

(5) The clauses apply even if Griffith had no employees on other job sites at the time they contracted with Urban Pacific or at the time Urban Pacific performed the work.

(6) The clauses apply even if Griffith has no employees of any craft on the job site or elsewhere.

(7) The clauses apply even if the work subcontracted to Urban Pacific by Griffith has long been completed at the time of the demand for payment.

Nonetheless, the court concluded that the delinquency of one subcontractor affects the welfare of all employees who are members of Local 12, including some who may, from time to time, be employees of Griffith. This holding means that all Union members are deemed to have a community of interest among themselves regardless of the particular job site upon which they may be working. In other words, all 40,000 of the Union's members may be said to be employed at one big job site covering thousands of square miles in the 11 county southern California area!

The Ninth Circuit's opinion manifestly indicates a lack of understanding of the artful term "community of interest".[11] In 1959, it was well established that the Board will group employees for collective bargaining purposes where they have a "community of interest" among themselves. In the usual industrial situation, the term means that workers at one end of a factory may join together with workers at the other end of the factory to negotiate one collective bargaining agreement, so that the whole factory is a union represented factory protecting the interest of all employees of the particular employer. In the construction context "community of interest" has a similar meaning. Thus, construction workers at one end of a job site may be said to have a "community of interest" with construction workers at the other end of the job site, so that all workers may be assured that the whole job is an "all union" site regardless of the separateness of their individual employers. They thereby insure that all employees are union members and

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[11]The court drew the term from this Court's opinion in *Connell Construction Co., Inc., supra*, where at p. 631, the Court noted that the construction industry proviso may have been "adopted as partial substitute for an attempt to overrule . . . Denver Building Trades" and because of the "close community of interests" on particular job sites.

covered by a union contract on that job site. Accordingly, the term "community of interest" as used by Congress and this Court may support the argument that Congress intended that particular job sites may be "all union" projects. However, the clauses at issue here extract money from Griffith for work performed on non-Griffith job sites and go far beyond the interest construction workers may have in seeing to it that their work place is "all union" and that all operating engineers on the site enjoy union working conditions.[12]

In sum, the "community of interest" of workers on a construction job site means, at maximum, their interest in working side-by-side with other union members on "all union" projects enjoying union conditions *there*. The Griffith project was, of course, an "all union" job site. Therefore, the justifiable "community of interest" of Griffith's employees was fully satisfied. Inasmuch as these clauses go far beyond such justifiable interest, they are unlawful.

As another justification for its holding, the Court of Appeals offered the bizarre notion that one purpose of the construction industry proviso is to prevent "dislocation[s] at the job site"; which dislocations could occur as a result of a primary strike by the Union. The court offered no authority (either case holding, dictum, legislative history, treatise, or even law review article) in support of this view.[13]

This Court has long established that Section 8(e) of the Act deals with the regulation of secondary boycott agreements, *i.e.*, agreements where neutral employers such as Griffith are compelled to boycott employers with whom the

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[12]The carpenter agreement in *Woelke & Romero*, *supra*, also contains clauses dealing with fringe benefit delinquencies. Unlike the clauses herein, the carpenter clause limits the liability of the general contractor to carpentry work performed on the site controlled by the general contractor. The carpenter clause does not regulate working conditions at other, long completed, job sites.

[13]The NLRB did not suggest such a rationale.

union has a dispute. The proviso to Section 8(e) was intended, as this Court said, in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 638-639, as:

> "A measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interest there, but to ban secondary objective agreements concerning non-job site work in which respect the construction industry is no different from any other."

At most, the proviso permits some types of *secondary boycott agreements*. It simply has nothing to do with legitimate primary strike activity by a union. Indeed, the courts have no legitimate basis for concern about "dislocations" at a job site where the strike is limited to the employer with whom the union has a primary dispute. It is certain that Congress granted to employees the right to withhold their labor from their employer until their demands are met. A foreseeable and unavoidable consequence of such a strike is that the work subcontracted will be delayed and it may be necessary for Griffith to engage a replacement subcontractor. But, as the Court said in *NLRB v. Local 825, International Union of Operating Engineers (Burns and Roe)*, 400 U.S. 297, 304:

> "Some disruptions of business relationships is a necessary consequence of the purest forms of primary activity. These foreseeable disruptions are, however, clearly protected." (Citations omitted.)

The three Petitioners here, and we believe the vast majority of contractors in this country, recognize and accept as a business risk, the fact that a union-signatory subcontractor may be struck by its employees. Such *primary* "dislocations" were not intended to be regulated under any circumstances, least of all by the construction industry pro-

viso to Section 8(e).[14] In this factual context, the Union was clearly entitled to strike Urban Pacific, the primary employer, although it failed to do so. Griffith would encourage the Union to enforce its collective bargaining agreements at the expense of "dislocations" at its job site and even if the cause of the primary strike relates back to past transgressions of Urban Pacific. The Court of Appeals has seriously erred on an important policy issue. Its opinion must be reversed.

The Decision Below Conflicts With Decisions of This Court, Other Circuit Courts, the NLRB and Other Ninth Circuit Precedents Insofar as It Does Not Restore the *Status Quo Ante* by Ordering Restitution to Petitioners.

Surely a secondary clause that permits a strike of the neutral employer is, on its face, coercive. It is also well established that such "self help" voids the protection of the construction industry proviso because Congress would not "countenance" such agreements.[15] The evidence showed that the strike provision was deliberately inserted as "le-

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[14]Perhaps the court's concern for "dislocations" stems from a misreading of the general Congressional intent as expressed in Section 1 of the original Wagner Act of 1935 (49 Stat. 449) that remains a part of our basic labor policy today. (29 U.S.C. §151). That declared policy is to mitigate industrial strife ("dislocations"?) by "encouraging the practice and procedure of collective bargaining" and by permitting workers to select labor unions to represent them in collective bargaining. Of course, the collective rights of workers and their rights to join unions are not herein involved.

[15]*NLRB v. I.B.E.W. Local 769 (Ets-Hokin)*, 405 F.2d 159, 163 (9th Cir. 1958), cert. denied 395 U.S. 921 (1969). Conference Committee Report H.R. Rep. No. 1147, 86th Cong., 1st Session 39, I Leg. Hist. 943; see also 105 Cong. Rec. 17,900, II Leg. Hist. 1433; 105 Cong. Rec. A8359; II Leg. Hist. 1830; *Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958); *Associated General Contractors, Inc. v. NLRB*, 514 F.2d 433, 438-39 (9th Cir. 1975); *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975); *Bricklayers Local No. 2 v. NLRB*, 562 F.2d 775, 787-88 (D.C. Cir. 1977); *NLRB v. Muskegon Bricklayers Union*, 378 F.2d 859 (6th Cir. 1967).

verage" to compel neutral employers to pay without argument over the lawfulness of the clause or even the underlying amounts. For a relatively short while, Petitioners were partially successful in resisting this coercion. But when the District Court *sua sponte* dissolved its injunction, they, like the contractors who had paid initially, were forced to pay the sum demanded and without argument. The authority of the Union to idle a million dollars of equipment was simply too great an economic burden.

The manifest coercive nature of the strike provision should have, consistent with *Local 60, United Brotherhood of Carpenters, supra; Acco, supra; Carrier, supra; Associated General Contractors of California, supra*; and *Continental Air Filters*[16] resulted in an order directing restitution of the coercively paid monies. Indeed, in a case decided *subsequent* to this case, a different panel of the Ninth Circuit held:[17]

> "But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical §8(b)(4) violation."[18]

Instead of decrying the strike threat, this panel of the Ninth Circuit lauds the conduct of the trustees as actions undertaken to protect the interests of the beneficiaries "by means short of filing suit for breach of contract". Unquestionably, restitution should have been ordered.

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[16]*Sheet Metal Workers' International Association, Local Union No. 33*, 196 NLRB 55 (1972), reversed for further findings of secondary object (before this Court decided *NLRB v. Enterprise Association*, 429 U.S. 507 (1977)), 498 F.2d 687 (D.C. Cir. 1974); see also Local 814, *Teamsters (Santini Brothers)*, 208 NLRB 184 (1974), enforced 546 F.2d 989 (D.C. Cir. 1976).

[17]*Joint Council of Teamsters No. 42 v. NLRB*, Nos. 80-7455, 80-7456 and 80-7457, slip opinion p. 6185, December 21, 1981; Petition for rehearing pending.

[18]Petitioners also maintain that there was in fact a Section 8(b)(4)(B) violation inasmuch as the trustees used the "leverage" of a strike threat.

It is apparent that the Board and the courts need direction with respect to reimbursement of monies coercively obtained through illegal "hot cargo" clauses. Inconsistencies between Board opinions, between the Board and the Circuit Courts, and within the Ninth Circuit itself cry out for resolution. Conflicting decisions are unacceptable if we are to have a national labor relations policy. The Board and the lower federal courts need direction for the Court with respect to the restitution of monies coercively obtained through illegal "hot cargo" clauses. The Board has been inconsistent on this issue as has the Ninth Circuit. The other Circuit Courts are likewise confused.[19] This case presents to the Court a compelling opportunity to resolve these conflicts.

CONCLUSION.

The Ninth Circuit's ruling in *Woelke & Romero, supra,* will be reviewed by this Court. This case presents a factual pattern that permits the Court to have before it a greater appreciation of the complex issues involved in the interpretation of the construction industry proviso. For this and the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Los Angeles, California

Dated: January 26, 1982.

Respectfully submitted,

JOHN H. STEPHENS,

Attorney for Petitioners.

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[19]Compare *Santini Brothers, supra* note 16 with *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. NLRB,* D.C. Circuit Case Nos. 80-1503, 80-1807 and 1808; slip opinion issued December 4, 1981.

Appendix

APPENDIX A.
Opinion of the Court of Appeals.

United States Court of Appeals, Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co. and Security Paving Co., Inc., Petitioner, v. National Labor Relations Board, Respondent, and Local No. 12, International Union of Operating Engineers and Operating Engineers Health & Welfare Fund, et al., Intervenors. National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union 12, Respondent, Griffith Company et al., and Operating Engineers Health and Welfare Fund et al., Intervenors. Nos. 79-7394, 80-7103.

Argued and Submitted May 8, 1981. Decided Oct. 26, 1981.

On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board.

Before CANBY and REINHARDT, Circuit Judges, and HILL,* District Judge.

CANBY, Circuit Judge:

This case returns for appellate review having been previously remanded to the Board for further consideration. 545 F.2d 1194 (9th Cir. 1976), *cert. denied*, 434 U.S. 854, 98 S.Ct. 171, 54 L.Ed.2d 125 (1977). The present petition raises several issues. The primary question presented is whether the construction industry's limited exemption from hot cargo agreements, § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), renders lawful a provision in a Master Labor Agreement which prohibits an employer from subcontracting work to any signatory subcontractor who is

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*The Honorable Irving L. Hill, United States District Judge, for the Central District of California, sitting by designation.

delinquent in required payments to a common employee fringe benefit trust. Secondary issues include: (1) whether these agreements can be enforced by economic coercion; (2) whether the union must reimburse the employers for any monies which were contributed pursuant to the contract provision; and (3) whether certain statements by the trust administrator and counsel for the fund to an employer constituted a threat by union agents to invoke the self-enforcement provision of the contract.

I

The relevant facts are recited in our previous decision 545 F.2d at 1195-96. They are summarized here for convenience. Griffith Company, J. W. Nicks Construction Company and Security Paving Company, Inc. (Griffith) are general contractors in Southern California. All are members of a construction industry trade association which negotiated a Master Labor Agreement (MLA) with Local 12 of the International Union of Operating Engineers. A large number of other contractors individually negotiated "short form" agreements with Local 12 which incorporated by reference most of the terms and conditions of the MLA.

The agreement establishes four employee benefit trusts pursuant to § 302(c) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(5). Each trust is jointly administered by a Board of Trustees composed of members appointed in equal numbers by the employer groups and the union. The funds are managed by a hired administrator.

Contributions to each trust are pooled into one account. An employee's eligibility for benefits is not dependent on whether his employer has actually contributed to the trust. The employer's failure to contribute, however, decreases the total funds in the pool and thereby results in reduced benefits for all beneficiaries. As the size of the required

trust payments has increased, so too has the number of employers who are delinquent in their payments. The union has employed various methods to combat the delinquency problem. The most recent approach is manifest in paragraphs 15[1] and 16[2] of the MLA.

Firms which are delinquent in their contributions and are unable to reach a settlement with the trustees are placed on the fund's official delinquency list. Copies of this list are sent to the signatory contractors and the union. Paragraph 15 of the MLA provides that no employer shall contract any work to a delinquent subcontractor until the subcontractor has paid all delinquent amounts. Paragraph 16 provides that if an employer violates paragraph 15 by hiring a subcontractor then listed as delinquent, the employer is liable for all prior delinquency payments even if those payments were not incurred as a result of work done at the employer's worksite. If the subcontractor becomes delinquent after

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[1]Paragraph 15 provides in pertinent part:

> The Trustees of the Trust Funds through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds. . . .

[2]Paragraph 16 provides:

> In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.
>
> (a) Where the Contractor fails or refuses to make payments reuired under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

commencing work on the employer's project, the employer must terminate the subcontractor, and if the employer fails to do so, the employer becomes liable for all delinquencies incurred on the job by the subcontractor ten days after the subcontractor's name appears on the delinquency list. Paragraph 16 also permits the union to picket or strike to enforce these provisions.

In 1973, the trustees discovered that the Urban Pacific Construction Company, a firm whch had signed a short form agreement with the union and was on the delinquency list, was doing work for Griffith. Griffith had notice of Urban Pacific's prior delinquencies at the time of contracting. The trust administrator, Mr. Majich, and his attorney informed the employer that if the delinquencies were not paid, the administrator would notify the union of its right to enforce paragraph 16 by economic action. Griffith refused to pay and the administrator notified the union.

Griffith then filed a complaint with the NLRB alleging that paragraphs 15 and 16 were an agreement to cease doing business with another employer in violation of § 8(e)[3] and that the statements by the trust officials were a threat to

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[3]§ 8(e), 29 U.S.C. § 158(e) provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

strike for secondary purposes in violation of § 8(b)(4)(ii)(B).[4] The Board held that agreement was a primary provision intended to preserve union standards or union employment and therefore rejected the complaint.

This court found the agreements were secondary and accordingly reversed. The court remanded the case to the Board with instructions that it determine whether the clause was rendered lawful by the construction industry's limited exemption from "hot cargo" agreements.[5] It further instructed the Board to consider whether, if the clauses were unlawful, the union was required to reimburse the employers for any monies which were contributed pursuant to the contract provisions and whether certain statements by the administrator and the trust counsel constituted a threat by union agents to invoke the self-enforcement provisions of the delinquency clause.

On remand, the Board held that the delinquency clause, with the exception of the self-help provision, was within the scope of the construction industry proviso and the pay-

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[4]§ 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: . . .

[5]See n.3, *supra*.

ments made pursuant to that clause were therefore legal. The Board also concluded that the trust officials were not acting as agents of the union in making the questioned statements. We agree with the decision of the Board and enforce its order.

II

In *Pacific Northwest v. NLRB*, 654 F.2d 1301 (9th Cir. 1981) this court, sitting en banc, held that a Master Labor Agreement containing a union signatory clause requiring an employer to subcontract only to subcontractors who employed members of a particular union was within the scope of the construction industry proviso. The court focused on the unique nature of the construction industry, where short-term hiring and the extensive use of subcontractors make it difficult to define the primary bargaining unit and serve to create a community of interests among all workers at the jobsite. The court rejected the position advocated here by Griffith that the 8(e) proviso was intended solely to prevent jobsite friction between union and non-union workers. Instead, it adopted the view that where a collective bargaining relationship exists, an agreement which serves the community of interests at the jobsite is permitted. At 1318-1322. See also, 105 Cong. Rec. 17900, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter Leg. Hist.] 1433, (Senator Kennedy).

We believe that paragraphs 15 and 16 of the MLA serve the community of interests at the jobsite and consequently fall within the proviso. Griffith would have us adopt the view that because the subject matter of the contract concerns delinquencies that may be unassociated with the general contractor's jobsite, the provisions are unrelated to the community of interests there. This argument takes entirely too restrictive a view of the construction industry proviso as

interpreted by *Pacific Northwest*. When a general contractor engages a subcontractor who is delinquent in his trust fund payments, that subcontractor's employees may engage in a primary strike at the work site. Such a strike can cause exactly the type of dislocation at the jobsite that the construction industry proviso was intended to prevent. Moreover, because contributions to the pension system are pooled into one account, the delinquency of the subcontractor affects the welfare, through the pension benefits, of all employees at the jobsite. The provisions of the collective bargaining agreement under review here and their judicial enforcement are well calculated to serve the communal interests at the jobsite. We accordingly agree with the Board that these interests are protected by the construction industry proviso.

III

Paragraph 16 permits the unions to enforce the delinquency provisions by economic measures. The Board properly found that because the clauses were secondary they could not be enforced by self-help.

Although the 8(e) proviso exempts the construction industry from the prohibition against secondary boycott agreements, it does not exempt the industry from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history clearly indicates that agreements entered pursuant to § 8(e) were to be enforced judicially rather than by self-help.[6] Conference Committee Report H.R.Rep. No. 1147, 85th Cong., 1st Session 39, I Leg.Hist. 943; see also 105 Cong.Rec. 17,900, II Leg.Hist. 1433 (Senator Kennedy); 105 Cong. Rec. A8359, II Leg.Hist. 1830 (Sen-

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[6]Indeed it appears that even Local 12 has conceded that the self-help provision is invalid.

ator Goldwater). This court has followed that view on numerous occasions. *See e.g. Pacific-Northwest*, at 1323-24; *Associated General Contractors, Inc. v. NLRB*, 514 F.2d 433, 438-39 (9th Cir. 1975); *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975); *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 163-64 (9th Cir. 1968), *cert. denied*, 395 US. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969). Accord: *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 886 (D.C. Cir. 1980), *cert. denied*, __ U.S. __, 101 S.Ct. 2058, 68 L.Ed.2d 357 (1981); *Bricklayer's Local No. 2 v. NLRB*, 562 F.2d 775, 787-88 (D.C. Cir. 1977); *NLRB v. Muskegon Bricklayers Union*, 378 F.2d 859 (6th Cir. 1967).

Griffith argues, however, that because the self-help clause is invalid, the entire provision should be voided. We disagree. In *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d at 162, this court held that only that part of a contract that exceeds the limits of the construction industry proviso is negated. We implicitly reaffirmed this view in *Pacific Northwest*, where we upheld a union signatory clause but invalidated provisions for its enforcement by self-help.

IV

The Board concluded that neither the administrator nor his counsel was an agent of the union. The Board accordingly dismissed the contractor's claim that the union through its agents violated § 8(b)(4)(ii) by threatening to invoke the self-enforcement provisions of the MLA. The Board's decision is supported by substantial evidence.

Each trust was established pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). That section requires the fund trustees to serve as independent fiduciaries and act solely in the interests of the bene-

ficiaries. See *Toensing v. Brown*, 528 F.2d 69 (9 Cir. 1975). To ensure the independence of the trust, § 302(c)(5) requires that the employers and employees be equally represented in the trust administration. Courts and the Board have held that action by the trustees will be attributed to the union under the following fact situations:

(1) Where provisions of a collective bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees. *Local 80, Sheet Metal Workers* (Turner-Brooks Inc.) 161 NLRB 229, 234 (1966); or

(2) Where the trustee's actions which are in question were directed by union officials. *Jacob Transfers Inc.*, 227 NLRB 1231, 1232 (1977); or

(3) Where the trustee's acts which are in question are undertaken in their capacities as union officials rather than as trustees. *NLRB v. Construction & General Laborers Union*, 577 F.2d 16, 20 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 35 (1979).

The above list summarizes holdings thus far made and may not include all possible factual situations in which trustee action will be attributed to the union.

None of the three fact situations listed above is present in the instant case. There is nothing in the collective bargaining agreement which permits the trustees to act on behalf of the union. The trustees are required to administer the funds solely for the benefit of the employees and Paragraph 16 provides that the union alone has the right to strike in order to enforce the provision of the MLA. There is also no evidence that the communication of Mr. Majich (which the company characterizes as a threat of a strike) was directed by any union official. Moreover, Mr. Majich is an employee of the trust and is not a union official and he had no connection with the union.

There is nothing in the facts which would support a finding of agency. Contrary to the contractor's assertions, the administrator and his counsel cannot be viewed as union agents merely because they attempted to secure prompt payment of delinquencies. To officials, under a duty to maximize trust assets for the beneficiaries, sought to fulfill this obligation by means short of filing suit for breach of contract. Viewed in this light, the actions by the administrator and his counsel threatening to inform the union of its rights to strike were not done on behalf of the union but were undertaken to protect the interests of the beneficiaries.[7]

Because the unions did not engage in the forbidden self-help to compel the contractors to comply with their contractual obligations, we conclude that the payments by the contractors to the pension funds were not exacted by unlawful means and therefore are not subject to reimbursement. *Cf. Graphic Arts International Union Local 280 v. NLRB*, 596 F.2d 904 (9th Cir. 1979); *Sheraton Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970) (reimbursement ordered where money received by illegal coercion).

V

This court's en banc decision in *Pacific-Northwest* held that the scope of the 8(e) proviso extends to contractual provisions which further the common interest of workers at the jobsite. The delinquency clauses at issue clearly fit within the proviso as there interpreted. Further, there is substantial evidence to support the Board's determination

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[7] J. J. Haggerty Inc., 139 NLRB 633, 651-653, 654-55 (1962), *enforced in relevant part sub nom. International Union of Operating Engineers v. NLRB*, 321 F.2d 130, 137 (2d Cir. 1963) and *Local 80 Sheet Metal Workers* (Turner-Brooks Inc.), 161 NLRB at 234, relied upon by the contractors are distinguishable. In both cases the trustees were not serving the interests of the trust beneficiaries but of the unions who appointed them.

that the trust administrator and his counsel were not agents of the union and that the union, therefore, did not threaten to invoke the self-enforcement provisions of the contract. However, the self-enforcement provisions are invalid under § 8(b)(4)(ii)(B).

Accordingly, we enforce the Board's order in its entirety.

APPENDIX B.
Supplemental Decision and Order.

United States of America, Before the National Labor Relations Board.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; and Security Paving Co., Inc.[1] International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; and Security Paving Co., Inc. and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; and Engineering and Grading Contractors Association, Inc., Parties to the Contract. Case 21-CC-1451, Case 21-CE-126.

On June 28, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceedings.[2] Therein, the Board held that the fringe benefit fund clauses of the agreement in question were substantially in the interest and for the protection of the employees of the signatory employers, as opposed to union members, generally, and, accordingly, that enforcement of those provisions constituted primary conduct beyond the proscription of Section 8(b)(4)(B) of the National Labor Relations Act, as amended. Likewise, the Board held that the clauses themselves were not proscribed by Section 8(e) of the Act. The Board therefore dismissed the complaint in its entirety, without determining whether the aforesaid clauses fell within the construction industry exception to Section 8(e) or whether the trust funds' administrator and his represen-

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[1]Subsequent to the original Decision and Order issued herein, Sukut-Coulson, Inc., and V & L Construction Co., Inc., withdrew as parties in the instant proceeding.

[2]212 NLRB 343.

tative were acting as agents of the Union within the meaning of Section 8(b)(4)(B) by engaging in certain conduct with an object of forcing compliance with those clauses. Thereafter, the Charging Parties filed a petition for review of the Board's Decision and Order and the entire matter came to be heard before the United States Court of Appeals for the Ninth Circuit.

On November 4, 1976, the court handed down its opinion reversing the Board's Decision.[3] In the court's view, the benefits sought to be achieved by the clauses in question extend far beyond the relevant work unit, because such benefits as would accrue to the appropriate work unit were no more direct or substantial than those conferred on other units. Thus, the court concluded that the provisions and their enforcement constitute unlawful secondary activity. The court therefore remanded the proceeding to the Board for consideration of the issues not previously reached; namely, the applicability of the construction industry proviso contained in Section 8(e) of the Act to the clauses here in controversy, and the question concerning agency.

The Board accepted the remand. Pursuant to said remand, the Board invited the parties to file statements of position with respect to the issues raised. Such statements have been filed by the General Counsel, the Charging Parties, and the Intervenors.[4]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Re-

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[3]545 F.2d 1194, cert. denied *sub nom. Waggoner, et al. v. Griffith Company, et al.*, 434 U.S. 854 (1977).

[4]At the hearing, the Administrative Law Judge granted a motion to intervene which was filed by counsel for the trustees of the Operating Engineers Health and Welfare, Pension, Vacation-Holiday, and Apprentice Training trust funds.

lations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed further the entire record in this proceeding, including the statements of position, and, on the facts and for the reasons hereinafter set forth, hereby finds:

The Charging Parties herein are bound to a Master Labor Agreement negotiated jointly by Respondent International Union of Operating Engineers, Local Union No. 12, and Associated General Contractors of California, Inc. (herein AGC), Building Industry Association of California, Inc. (herein BIA), and Engineering and Grading Contractors Association, Inc. (herein EGCA). Among other things, the agreement provides various fringe benefits for covered workers who qualify. Specifically, these include a health and welfare plan, a pension plan, and paid vacations and holidays. Funding for these programs has been established by several separate agreements and declarations of trust, previously negotiated.

The Master Labor Agreement requires that each covered contractor pay into the several trust funds thus established designated sums for each hour a worker is employed. The trust funds maintain separate records for each of the workers, post to their accounts credit thus earned, and disburse earned benefits to those who qualify.

Each trust fund is controlled by a board of trustees composed of an equal number of union and contractor association members. Any trustee may be removed at will by the party responsible for his designation. The several boards exercise their responsibility for administration of the trust funds through a trust fund administrator, employed by a nonprofit corporation whose board of directors is itself com-

posed of the several trust fund trustees (the Intervenors herein).

Should any contractor covered by the aforementioned agreement become delinquent with respect to trust fund contributions, the trust funds' administrator may commence legal proceedings to recover such delinquencies. To the same end, the agreement also provides for self-help. Article I, section B, paragraph 14, provides that the administrator:

> . . . shall give written notice to a delinquent Contractor or Subcontractor, with a copy to the Union, advising him to correct a delinquency within ten (10) days of the giving of such notice. The Union shall withhold service from any or all jobs of such delinquent Contractor or Subcontractor after said ten (10) day period if the delinquency is not corrected . . . .

The same section of the Master Labor Agreement also delineates circumstances whereby covered contractors may become liable for the various accrued or current delinquencies of their subcontractors. It provides, as well, the means for their recovery. These are the provisions, quoted below, which give rise to the instant proceeding:

> 15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractor Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list unless such Contractor has paid all delinquent monies to the various Trust Funds.
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> 16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums

over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to promptly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

All contractor-members of the three trade associations, AGC, BIA, and EGCA, are bound by the foregoing agreement, which covers an 11-county southern California territory. In addition to these contractors, others, likewise engaged in building and construction work within the same area, may be bound by the provisions of the Master Labor Agreement by signing so-called short-form contracts. These contracts either paraphrase the relevant provisions of the Master Labor Agreement or adopt them by reference. Thus, short-form signatories are also contractually obligated to contribute to the several trust funds supporting the health and welfare, pension, vacation and holiday, and apprentice training programs.

As previously mentioned, the trust funds' administrator is responsible for the collection of delinquent contributions. To this end, the administrator issues a so-called 10-day delinquency notice to the defaulting contractor, with a copy to the Respondent Union. Should the contractor thereafter fail to satisfy this delinquency within the aforesaid period the contractor's name is placed on the funds' official delinquency list, which is dispatched to the concerned contractors associations, the Respondent Union, and other signatory

employers pursuant to paragraph 15 of the Master Labor Agreement, quoted above. If the administrator fails to obtain results by the foregoing action, he may thereafter invoke paragraph 16.

In 1971, an audit of the several trust funds revealed substantial delinquencies on the part of a number of short-form signatories doing business as members of the so-called Urban Pacific Group. Between April 20 and October 19, 1972, these firms were awarded a number of subcontracts calling for the performance of underground pipe and sewer work from, among others, the Charging Parties herein, who were engaged as prime or general contractors on a number of construction projects in southern California. By acquiring these subcontracts, the Urban Pacific companies again became privy to the short-form agreement.

In January 1973, a trust fund's field representative discovered two Urban Pacific Group members doing subcontract work at a Nicks construction project. Further investigation revealed that firms within the Urban Pacific Group were also awarded subcontracts by the other Charging Parties. These contractors were then notified of their responsibility for payment of the Urban Pacific delinquencies. Following a conference with the trust funds' administrator in February, Security and V & L paid a portion of the Urban Pacific outstanding delinquency. Subsequently, Griffith was requested to pay an amount in excess of the Urban Pacific delinquency arising from the latter's failure to make contributions for work performed under the Griffith subcontract. On February 12, 1973, the trust funds' administrator notified the treasurer of the Respondent Union, and a trust of three of the trusts involved, that, consistent with article I, section B, paragraph 16(a), of the Master Labor Agreement, the Respondent Union had the "right to withhold services" from "any or all jobs" of the five contractors

involved. There followed, between March 7 and 14, 1973, a series of telephone conversations between the attorney representing the trust funds and counsel for the five contractors. During one of these conversations, the trust funds' attorney warned his counterpart that, if the contractors failed to satisfy the Urban Pacific delinquencies, the trust funds' administrator would renew his notice to the Respondent Union regarding the latter's right to withhold services under paragraph 16(a). The foregoing gave rise to the issuance of the complaint herein.

1. The court having found that the clauses here in question and their enforcement constitute secondary activity within the ambit of Sections 8(b)(4)(B) and 8(e) of the Act, it is incumbent upon us, in the first instance, to determine whether or not the clauses are nevertheless protected by the construction industry proviso to Section 8(e) and are therefore valid.

The General Counsel and the Charging Parties contend that, under the Supreme Court's *Connell* decision,[5] these clauses are not privileged by the aforesaid proviso because they are not limited, on their face, to those times and places wherein the signatory employer actually employs individuals who are covered by the agreement.

The Charging Parties further contend that the proviso to Section 8(e) was designed solely to permit agreements that require subcontractors to be parties to contracts with a particular union and thereby alleviate the friction that may arise between union and nonunion employees working at the same construction site, and, therefore, the proviso does not priv-

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[5]*Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO*, 421 U.S. 616 (1975).

ilege agreements whereby signatory employers agree to guarantee the fringe benefit contributions of union subcontractors. We find no merit in either contention.

In *Woelke & Romero*[6] the Board reviewed subcontracting clauses[7] that were secondary in effect and determined that

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[6]*Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke & Romero Framing, Inc.)*, 239 NLRB No. 40 (1978).

[7]The proposed contract in that case contained, *inter alia*, clauses 103.2, 103.3, 103.3.1, and 103.6 as follows:

> 103.2 The contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.
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> 103.3 Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), herein called "jobsite work," and because of the Union's concern that subcontractors who are not subject to the same total labor costs as those who are party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:
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> 103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.
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> 103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance of his subcontractors with the full terms of this Agreement.

such provisions were, in fact, protected by the construction industry proviso to Section 8(e) as the Supreme Court had interpreted it in *Connell, supra*.

In its analysis of those clauses, the Board first noted that it had in the past "construed the construction industry proviso literally to protect 'any agreement' between qualified parties which limits subcontracting of work to be performed at the site of construction to employers who are signatory to a specific union agreement or to an agreement generally with the 'appropriate union' (meaning, an affiliate of a building and construction trades council)."[8]

The Board then went on to find that the *Connell* decision did not compel a narrow interpretation of the proviso. Rather, the Board determined that the Court's construction of the provisos permitted subcontracting clauses such as those involved in *Woelke & Romero* as long as they were advanced in the context of a collective-bargaining relationship between the respondent union and the charging party.

Applying the rationale of *Woelke & Romero* to the instant case, it is undisputed that, at all times material herein, the Respondent Union and the Charging Party had an established collective-bargaining relationship. Accordingly, we find no merit to the contention that the disputed clauses herein are rendered unlawful by the Supreme Court's decision in *Connell*.

It is apparent, however, that the clauses involved in the instant case achieve a somewhat different end from those discussed in *Woelke & Romero*. The effect of the clauses in the former case is to restrict a signatory employer's ability to subcontract jobsite work to subcontractors who do not have an agreement with the particular union involved. The

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[8]*Woelke & Romero, supra*, sl. op., p. 19.

effect of the instant clauses is to restrict a signatory employer's ability to subcontract jobsite work to employers who are also signatory to an agreement with the Respondent Union, but who are listed as delinquent in their contributions to the trust funds described above. In the event the general contractor, in derogation of the agreement, does in fact subcontract to delinquent subcontractors, it becomes liable for all accrued delinquencies of the subcontractor.

As noted above, we do not agree with the contention of the Charging Party that the construction industry proviso to Section 8(e) does not protect the fringe benefit guarantee clause involved herein. The express terms of the proviso state, "That nothing in . . . subsection (e) shall apply to *an* agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of . . . construction . . . ." [Emphasis supplied.] Thus, we find nothing in the express language of the proviso itself that indicates the intention of Congress to protect *only* union signatory agreements at construction sites. We find additional support for the interpretation of the proviso in the legislative history of the 1959 amendments to the Act. In the Senate debate prior to the passage of those amendments, then Senator Kennedy stated, in explaining the proviso to Section 8(e) that:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under Section 8(e). *The proviso is also applicable to all other agreements involving undertakings not to do work on a construction site with other contractors or subcontractors*

regardless of the precise relation between them. [Emphasis supplied.][9]

We think that the above-stated portion of the legislative history indicates that, while permitting union signatory agreements with respect to the subcontracting of construction site work may have been the primary intention of Congress in enacting the proviso, it was not the sole and exclusive intention. Rather, the emphasized language above demonstrates, in our view, that the protection of the proviso may be applied to contract clauses with secondary objectives concerning jobsite work regardless of the precise relationship between the general contractor and the subcontractor. Keeping in mind the special nature of the construction industry and the close community of interest that exists there, we find the requirement imposed by the disputed clauses that the general contractor not subcontract work to delinquent subcontractors is a legitimate interest protected by the proviso.

That the general contractor may become liable for accrued delinquencies arising from previous jobs of the subcontractor, if it, in derogation of paragraph 15, subcontracts work to a delinquent subcontractor, does not, in our opinion, remove the clause from the protection of the proviso. Since the clauses clearly relate to the subcontracting of work performed at the jobsite, the fact that the economic implications of the Charging Parties' failure to adhere to the clauses may extend beyond the particular job in question is not a crucial consideration.

2. We turn next to the contention of the General Counsel and the Charging Parties that whatever protection the questioned clauses might otherwise enjoy is removed because they provide for an unprivileged means of self-enforcement.

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[9]II Leg. Hist. 1433 (LMRDA, 1959).

The Board has consistently held, with court approval, that, although a secondary agreement falling within the construction industry exception to Section 8(e) is exempt from the operation of that section, it may be enforced only through lawsuits and not by threats, coercion, or restraint proscribed by Section 8(b)(4).[10] Coercion, in this respect, has been defined as "non-judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute."[11] Further, we have held that clauses which authorize the use of proscribed measures by a union to enforce secondary subcontracting provisions will serve to remove whatever protection such clauses would otherwise enjoy under the proviso to Section 8(e).[12]

Paragraph 16(a), quoted above, clearly permits the Respondent Union to strike signatory contractors if voluntary compliance with the secondary provisions of the agreement is not achieved. Accordingly, we find that article I, section B, paragraphs 15 through 16(a) of the Master Labor Agreement, is violative of Section 8(e) of the Act.[13]

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[10]See, e.g., *Los Angeles Building and Construction Trades Council; and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America (Donald Schriver, Inc.)*, 239 NLRB No. 42 (1978); *Associated Builders, supra; Ets-Hokin Corporation*, 154 NLRB 839 (1965), enfd. *sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO and its Local Union No. 769*, 405 F.2d 159 (9th Cir. 1968); *Muskegon Bricklayers Union 5, Bricklayers, Masons and Plasterers International Union of America, (AFl-CIO) (Greater Muskegon General Contractors Assn.)*, 152 NLRB 360 (1965), enfd. 378 F.2d 859 (6th Cir. 1967).

[11]*Local Union No. 48 of Sheet Metal Workers International Association v. The Hardy Corporation*, 332 F.2d 682, 686 (5th Cir. 1964).

[12]Fn. 10, *supra*.

[13]Chairman Fanning dissents from this finding. He has previously stated his position that the mere existence of self-enforcement features in a contract does not serve to remove the protection accorded that contract by the construction industry proviso to Sec. 8(e). See, e.g., his dissenting opinion in the *Muskegon* case, cited in fn. 10, *supra*. Accordingly, he would dismiss the complaint in its entirety.

3. Finally, we must determine whether or not the threat to invoke paragraph 16(a), by striking in support of the demand that the Charging Parties pay the accrued Urban Pacific delinquencies in trust fund contributions, constitutes conduct violative of Section 8(b)(4)(ii)(B) of the Act. The answer to this question, in turn, depends on whether the trust funds' trustees, acting through the representative of the administrator, are agents of the Respondent Union for purposes of communicating such a threat. We hold that they are not.

It is clear that joint trust funds established pursuant to collective-bargaining agreements under Section 302(c) of the Labor-Management Relations Act of 1947,[14] such as those involved in this proceeding, must be administered for the "sole and exclusive benefit of the employees," by trustees who "[r]egardless of their representative relationships . . . are still required to act with the highest fiduciary integrity" toward the funds and the beneficiaries.[15] Thus, there is nothing inherent in the system of relationships established by the creation of joint trust funds which accords agency status to the trustees appointed by the trust settlors.

Concededly, we have found trustees of such funds to be agents of both a union and a contributing employer for the purposes of accepting contributions from a respondent in order to comply with backpay awards,[16] requesting audits of an employer's records,[17] and when acting pursuant to a

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[14]29 U.S.C. §186(c).

[15]*Lamb v. Carey*, 498 F.2d 789, 793 (D.C. Cir. 1974), cert. denied 419 U.S. 869.

[16]*Jacob Transfer, Inc.*, 227 NLRB 1231 (1977); *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO; et al. (Fixtures Unlimited)*, 213 NLRB 363, fn. 1 (1974), enfd. in part, reversed in relevant part, and modified in part 531 F.2d 424 (9th Cir. 1976).

[17]*L & M Carpet Contractors, Inc.*, 218 NLRB 802 (1975).

specific mandate contained within a collective-bargaining agreement.[18]

These factors are totally absent in the case now before us. Indeed, nothing in the collective-bargaining agreement authorizes the trustees to speak for the Respondent Union or to decide any matter bearing on the right to strike. To the contrary, paragraph 16(a) specifically states that the Respondent Union, not the trustees, shall have the right to withhold services. In these circumstances, the trust fund administrator's threat of a renewed notice to the Respondent Union, concerning the latter's right to strike under the contract because of the failure to pay accrued delinquencies, constitutes no more than the vigorous exercise of the fiduciary powers and responsibilities entrusted to him for the sole and exclusive benefit of employees. Further, the fact that the interests of the administrator in this case harmonize with or parallel those of the trust settlors does not in itself give rise to an agency relationship between them. Accordingly, we find that neither the trust funds' administrator nor his counsel were acting as agents of the Respondent Union while engaging in the conduct complained of and that, therefore, the Respondent Union did not violate Section 8(b)(4)(ii)(B) of the Act.

ORDER[19]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

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[18] *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al. (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966).

[19] The Charging Parties request an affirmative order requiring reimbursement for payments made, under the provisions herein found unlawful, as a result of subcontractor delinquencies. Because we find that these payments were not involuntarily exacted by unlawful means, but were sanctioned by the contract to which they voluntarily agreed, we deem such an order inappropriate. See *General Longshore Workers, ILA Local No. 1418; and General Longshore Workers, ILA Local No. 1419 (E. Harris Mercer)*, 235 NLRB No. 31, fn. 24 (1978). Cf. *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742, fn. 3 (1973), reversed in relevant part 511 F.2d 848 (9th Cir. 1975), where the respondent also engaged in conduct violative of Sec. 8(b)(4)(ii)(B) of the Act.

hereby orders that the Respondent, International Union of Operating Engineers, Local Union No. 12, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing article I, section B, paragraphs 15 through 16(a), of its Master Labor Agreement, to the extent found unlawful herein by reason of the self-enforcement provisions, or from entering into, maintaining, giving effect to, or enforcing any other contract or agreement, express or implied, whereby AGC, BIA, and EGCA, on behalf of their employer-members or employers represented by them, agree to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of the Respondent Union, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by other material.

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[20]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

Dated, Washington, D.C. August 6, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the National Labor Relations Board An Agency of the United States Government.

WE WILL NOT enter into, maintain, give effect to, or enforce article I, section B, paragraphs 15 through 16(a), of our Master Labor Agreement, to the extent found unlawful because of the self-enforcement provisions contained therein.

WE WILL NOT enter into, maintain, give effect to, or enforce any other contract or agreement, express or implied, whereby Associated General Contractors of California, Inc., Building Industry Association of California, Inc., and Engineering and Grading Contractors Association, Inc., on behalf of their employer-members or employers represented by them, agree to cease or refrain from doing business with any other person in violation of Section 8(e) of the National Labor Relations Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, California 90014, Telephone 213-688-5229.

APPENDIX C.
Opinion of the Court of Appeals.

Griffith Company et al., Petitioners, v. National Labor Relations Board, Respondent. No. 74-2740. United States Court of Appeals, Ninth Circuit Nov. 4, 1976. As Amended on Denial of Rehearing and Rehearing En Banc April 5, 1977.

Before ELY and WALLACE, Circuit Judges, and RENFREW,* District Judge.

WALLACE, Circuit Judge:

This petition for review of a National Labor Relations Board (NLRB) decision presents a fairly novel and important issue of labor law: whether a provision in a collective bargaining contract prohibiting an employer from subcontracting work to any other signatory employer who is delinquent in required payments to common employee fringe benefit trusts violates federal labor law. The NLRB held that the agreement is valid and enforceable. We disagree and reverse and remand for further proceedings.

I. Factual Background

The three petitioners, Griffith Company, J.W. Nicks Construction Co. and Security Paving Co., Inc. (Griffith), are general construction contractors in southern California. Each is a member of a construction industry trade association which, jointly with two similar associations, negotiated a Master Labor Agreement effective July 1, 1969, to July 1, 1974, with the International Union of Operating Engineers, Local Union Number 12 (Union). The agreement covers hours, wages and working conditions for employees represented by the Union in eleven southern California coun-

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*Honorable Charles B. Renfrew, United States District Judge, Northern District of California sitting by designation.

ties. A large number of other employees have individually negotiated "short form" agreements with the Union which incorporate by reference most of the terms and conditions of the Master Labor Agreement.

These agreements obligate the employers to make specified contributions to four employee fringe benefit trust funds created pursuant to 29 U.S.C. § 186(c)(5). These trusts collect approximately $5 million per month from over 2,500 employers for the benefit of 40,000 employees. Each trust pools the contributions from all employers into one account. An employee's eligibility for benefits is generally dependent on hours worked, but has nothing to do with whether his employer actually made contributions to the trusts. Thus if an employer fails to make the required contributions, all beneficiaries suffer reduced benefit levels but no employees are completely cut off from benefits.

Over the years, delinquent employer contributions have been a significant problem. All four trust funds have experienced some financial difficulty and some have had to reduce benefits. The trusts have implemented a number of means to deal with delinquencies. One of these means is the subject of this case.

Once an offending employer is discovered and after informal settlement attempts have failed, the employer's name is placed on a delinquency list which is circulated to signatory employers. Article I, Paragraph B-15 of the Master Labor Agreement (Paragraph 15) then provides that no employer shall subcontract any part of a job to any subcontractor on the delinquency list until such subcontractor has paid the delinquent amounts. Paragraph 16 provides that if an employer does subcontract to a delinquent subcontractor in violation of Paragraph 15, then the employer is liable for the delinquency. If a subcontractor becomes delinquent after commencing work, the employer is liable for the delin-

quency and must terminate the subcontract. If the employer does not pay the amounts due, the Union is given the right to withhold services.[1]

In early 1973, the trustees learned that Urban Pacific Construction Co. (Urban Pacific), a contractor who had signed a short form agreement with the Union and who was on the delinquency list, was doing subcontract work for Griffith and others. The administrator of the trust funds notified these contractors that they were liable for the delinquencies under the Master Labor Agreement. The trust's attorney made at least four telephone calls informing Griffith that if the delinquencies were not paid, the administrator would notify the Union of its right to withhold services from Griffith. Two of the contractors paid part of the delinquency; Griffith and some of the others did not. Part of the delin-

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[1]These parts of the contract read as follows:

15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V of the Agreement.

16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

quency remaining unpaid, the administrator notified the Union that it had the right to withhold services from Griffith and the others who had not paid.

Griffith and two other contractors filed complaints with the NLRB charging that Paragraphs 15 and 16 of the Master Labor Agreement constituted an agreement to cease doing business with another employer in violation of section 8(e) of the National Labor Relations Act (Act), *as amended*, 29 U.S.C. § 158(e), and that certain threats to strike violated section 8(b)(4)(ii)(B). The trustees of the fringe benefit trust funds were permitted to intervene. After a hearing, an administrative law judge dismissed the complaints in their entirety. The NLRB, with two members dissenting, affirmed.[2] Griffith petitioned this court for review.[3]

II. Contentions of the Parties

Section 8(e) of the Act provides generally that it is an unfair labor practice for a labor organization and an employer to enter into an agreement whereby the employer agrees "to cease doing business with any other person."

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[2]The NLRB's decision and order are published at 212 NLRB 343 (1974).

[3]The petition for review was filed 79 days after the NLRB's order. The Union and the trustees argue that the petition was not filed within the 60-day period prescribed by 28 U.S.C. § 2107 for civil appeals where an agency of the United States is a party. But statutes are superseded by conflicting federal rules. 28 U.S.C. § 2072. Rule 4, Fed.R.App.P., contains provisions parallel to 28 U.S.C. § 2107, and Rule 20, Fed.R.App.P., provides that Rule 4 is not applicable to petitions for review of agency orders. Thus the 60-day limitation was specifically rejected. Rule 15(a), Fed.R.App.P., provides instead that a petition for review must be filed "within the time prescribed by law." Section 10 of the National Labor Relations Act, 29 U.S.C. § 160, does not specify such a time. Therefore, the Seventh Circuit has held that the doctrine of laches applies. The party challenging the timeliness of a petition must show that more time has elapsed than reasonably necessary and that it was prejudiced by the delay. *Kovach v. NLRB*, 229 F.2d 138, 141 (7th Cir. 1956). We adopt this standard and find that Griffith's petition was timely.

29 U.S.C. § 158(e).[4] Section 8(b)(4)(ii)(B) of the Act provides that it is an unfair labor practice for a labor organization "to threaten, coerce or restrain any person" where an object is to force any person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).[5]

Griffith contends that Paragraphs 15 and 16 of the Master Labor Agreement violate section 8(e) by requiring Griffith to cease doing business with delinquent subcontractors. It also charges that the action of the trusts' administrator in notifying the Union of its right to withhold services and the acts of the trusts' attorney's informing Griffith that the ad-

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[4]Section 8(e) provides in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . . .

29 U.S.C. § 158(e).

[5]Section 8(b)(4) of the NLRA provides in part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . . .
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike . . .; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . .: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

29 U.S.C. § 158(b)(4).

ministrator would take such action violated section 8(b)(4)(ii)(B) as threats with the object of forcing Griffith to cease doing business with delinquent subcontractors.

The administrative law judge and the NLRB both conceded that the challenged contractual provisions and the administrator's efforts to enforce them contemplated that signatory contractors such as Griffith would cease doing business with delinquent subcontractors such as Urban Pacific. They argued, however, that the statutes invoked prohibit not all agreements and threats with a cease doing business thrust but only so-called "secondary" activity. Because the activity in this case was found to be lawful "primary" activity and not secondary, Griffith's complaint was dismissed. The administrative law judge found, and the Union and the trustees contend, that the activity here came within the well-established "union standards" exception to section 8(e) and (b). The NLRB implicitly rejected this position but agreed with the administrative law judge's alternative ground that the activity came within a new exception sanctioned by broad language in *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). Therefore, the NLRB did not reach two other issues: whether section 8(e) should apply at all because of the provision excluding certain aspects of the construction industry[6] and whether the trust funds' administrator and the trust funds' attorney were agents of the Union for whose actions the Union is accountable pursuant to section 8(b)(4).

Responding to the conclusions of the NLRB, Griffith contends that the activity here was secondary, that the fringe

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[6]See note 4 *supra*.

benefit provisions in the contract are not permissible union standards clauses and that any new exception to section 8(e) for such clauses is not consistent with *National Woodwork*.

III. Primary-Secondary Distinction

Section 8(b)(4) was added to the Act by the Labor-Management Relations Act of 1947, ch. 120, Tit. 1, § 101, 61 Stat. 141-42. The statute has been difficult to interpret because its language seems to reach traditionally accepted labor practices. For example, traditional picketing of struck primary employers seeks, as one object, to encourage individual employees of neutral employers not to cross the picket lines. Yet this activity seems to come within the statutory proscription of inducement to cease doing business with others. The Supreme Court held in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-73, 71 S.Ct. 961, 95 L.Ed. 1277 (1951), that the Act could not be read to diminish the traditional right to strike unless the diminution is specifically set forth and that no such specific provision in section 8(b)(4) reached such primary activity. Over the years the problem of secondary effects of primary activity received considerable attention from the courts and the NLRB. *See* ABA, The Developing Labor Law 617-40 (C. Morris ed. 1971).

In 1959 the Landrum-Griffin Act added a proviso to section 8(b)(4) making explicit Congress' intent not to prohibit otherwise lawful primary strikes and picketing,[7] Act of Sept. 14, 1959, Pub.L. No. 86-257, Tit. VII, § 704(a), 73 Stat. 542, and added section 8(e). *Id.* § 704(b), 73 Stat. 543.[8] Although the language of section 8(e) is as broad as that of section 8(b)(4) before the addition of the proviso, the

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[7]See note 4 *supra*.
[8]See note 4 *supra*.

courts and the NLRB have held that it also prohibits only agreements with a secondary aim. *National Woodwork Manufacturers Association v. NLRB, supra; NLRB v. Joint Council of Teamsters No. 38,* 338 F.2d 23, 28 (9th Cir. 1964); *Service Local 399,* 148 NLRB 1033 (1964).

Comprehensive general principles for distinguishing primary from secondary agreements are difficult to formulate. The courts have developed some fairly settled rules concerning the validity under section 8(e) of a number of specific types of contractual provisions. For example, "work preservation" as well as "union standards" clauses are generally held valid while "work acquisition" and "union signatory" clauses are not. *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp,* 19 Kan.L.Rev. 651, 683-92 (1971). But no such rules dealing with the provisions challenged here have been formulated.[9] The Union, trustees, administrative law judge and the NLRB each attempt to justify the clauses either by bringing them within specific rules developed for "union standards" clauses or by creating a new exception for "fringe benefit

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[9]It appears that contractual provisions very similar to the ones involved here have been used in the southern California construction industry for some time. Such provisions have been involved in a number of cases before the NLRB. *General Teamsters Local 982,* 181 NLRB 515, 520 & n. 22 (1970), *aff'd sub nom. Joint Council of Teamsters No. 42 v. NLRB,* 146 U.S.App.D.C. 275, 450 F.2d 1322 (1971); *Southern California Dist. Council of Hod Carriers Local 345,* 158 NLRB 303, 308-10 (1966); *Orange Belt Dist. Council of Painters No. 48,* 153 NLRB 1196, 1197 (1965), *aff'd,* 124 U.S.App.D.C. 349, 365 F.2d 540 (1966); *Los Angeles Bldg. & Constr. Trades Council,* 150 NLRB 1590, 1597 (1965); *Cement Masons Local 97,* 149 NLRB 1127, 1130 n. 4 (1964); *Los Angeles Bldg. & Constr. Trades Council,* 145 NLRB 279, 281 (1963). None of these decisions, however, determined the validity of these clauses in a factual context similar to this case. *In General Teamsters Local 982, supra,* the NLRB noted that the clauses are not clearly unlawful on their face and, in the absence of evidence concerning the terms of the trust contributions and expenditures, dismissed that part of the complaint. 181 NLRB at 520, 524.

protection'' clauses under general principles distinguishing primary from secondary activity.

A. The *National Woodwork* Case

The leading case concerning the distinction between primary and secondary activity for purposes of sections 8(e) and 8(b)(4) is *National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357. There, Frouge, a general contractor working on a housing project in Philadelphia, was subject to a collective bargaining agreement between a local carpenters' union and a general contractors' association in which it was agreed that union members would not handle premachined doors. When Frouge ordered premachined doors for the project the union ordered its members not to hang them. Frouge then substituted ''blank'' doors which the carpenters fitted and cut at the jobsite. The National Woodwork Manufacturers Association, whose members make premachined doors, filed charges against the union with the NLRB. It claimed that the union violated sections 8(e) and 8(b)(4)(ii)(B) of the Act by including the ''will not handle'' provision in the collective bargaining agreement and enforcing it. The union's defense was that the object of the ''will not handle'' clause was preservation of the carpenters' on-site work of fitting and cutting blank doors and that this is a primary object not forbidden by those section. *Id.* at the 616-18, 87 S.Ct. 1250.

The NLRB found no violation of either section but the court of appeals disagreed. The court noted that section 8(e) was inserted in the Act at the same time as the proviso that section 8(b)(4) would not apply to primary strikes or picketing. Finding no similar restriction in 8(e), it concluded that there was a violation of section 8(e) regardless whether the union conduct was primary or secondary. *Id.*

The Supreme Court began its analysis with an exhaustive review of the legislative history. The Court concluded that section 8(e) as well as section 8(b)(4) was not meant to prohibit primary activity. Both sections were directed only at secondary boycotts whose "core concept" is "union pressure directed at a neutral employer the object of which [is] to induce or coerce him to cease doing business with an employer with whom the union [is] engaged in a labor dispute." 386 U.S. at 622, 87 S.Ct. at 1257 (footnote omitted).

The Court noted the importance of technological change to labor-management relations and reasoned that any effort by Congress to curtail voluntary negotiations of solutions to these problems would be accompanied by extensive study and debate. *Id.* at 640-42, 87 S.Ct. 1250. The Court also stated that the provisions of the act guaranteeing labor the rights to bargain collectively and to strike except as specifically provided in the Act, 29 U.S.C. §§ 157, 163, "caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions." *Id.* at 643, 87 S.Ct. at 1268.

In *National Woodwork* the determination whether a particular agreement and its enforcement violated sections 8(e) and 8(b)(4) required "an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." *Id* at 644, 87 S.Ct. at 1268 (footnote omitted). In making this inquiry, the Court focussed on two factors: (1) "the tactical object of the agreement and its maintenance," *i.e.*, whether the union means to influence the labor relations of the signatory ("boycotting") employer or to interfere with the labor relations of

others (the "boycotted" employers); and (2) the allocation of the benefits of the agreement, *i.e.*, whether they accrue mainly to the boycotting employees or other employees of the primary employer on the one hand, or, on the other, to members of the union generally. *Id.* at 645, 87 S.Ct. 1250, 1268. The Court concluded: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[10] *Id.* (footnote omitted).

The Court had no trouble concluding that the "will not handle" provision at issue in *National Woodwork* and its enforcement were lawful primary activity. The finding of the trial examiner, adopted by the NLRB, was that the purpose of the clause was preservation of work traditionally performed by jobsite carpenters, a primary motive. This finding was supported by substantial evidence. *Id.* 645-46, 87 S.Ct. 1250.

B. Application of *National Woodwork*

The administrative law judge found that the fringe benefit clauses at issue here were "clearly designed" to allow the trust fund's administrator and prime contractors to "pressure" delinquent subcontractors to remedy their delinquen-

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[10]The Union and trustees place too much emphasis on the general conclusory language, ignoring the two more specific factors considered by the Court. The parties also relied heavily on language from circuit court opinions stressing whichever of the two specific factors seemed to weigh most heavily in their favor. *See, e.g., Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 117 U.S.App.D.C. 233, 328 F.2d 534, 538 (1964) (clause is primary if it directly benefits covered employees); *NLRB v. Joint Council of Teamsters, No. 38, supra*, 338 F.2d at 28 (clause is secondary if directed at third-party employers). These cases and the others cited are consistent with the results from an analysis of the two factors considered by the Court in *National Woodwork*. For a summary of how the lower courts weigh these two factors, see Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 Va.L.Rev. 1280, 1297, 1300 (1971).

cies and to protect trust fund benefits by making other responsible parties liable for all delinquencies. The NLRB did not expressly adopt or reject these findings. It conceded that the clauses contemplate that signatory contractors would cease doing business with delinquent subcontractors but justified the clauses as helpful in protecting the fringe benefits of all employees of all signatory employers. Implicit in the NLRB's decision is a finding that the object of the clauses is to reduce delinquencies and thereby to improve fringe benefits for the trust funds' beneficiaries by requiring other employers to boycott delinquent subcontractors.

We conclude that these are secondary motives. Our course is clear when we apply the two keystone factors of *National Woodwork*. Examining first the tactical object of the boycott, it is obvious that the Union is not attempting to influence the labor relations policy of Griffith, the boycotting employer, but is instead trying to interfere with the labor relations policy of the boycotted employer, Urban Pacific. It is Urban Pacific with which the Union has a dispute over alleged delinquencies in trust fund contributions. Griffith's only offense lies in doing business with Urban Pacific.

The NLRB ignored this interference with Urban Pacific's labor relations and focused solely on the second *National Woodwork* consideration: the allocation of benefits of the boycott. In fact, the NLRB viewed the "critical question" as whether the agreement "was substantially in the interest and for the protection of the employees of [all contracting] employers." The NLRB then reasoned that since delinquencies cause all such employees to suffer reduce fringe benefits, the clauses which are designed to combat the delinquencies meet this test.

But this reasoning allows the Union to cast its protective net too widely. As the NLRB recognized, primary activity must confer benefits on the members of a relevant "work

unit" and not on some larger group such as members of the Union generally. But the NLRB adopted the administrative law judge's conclusion that the relevant work unit here is equivalent to the respective bargaining unit. But even if we adopted the bargaining unit measure, which we specifically do not,[11] we could not agree with the NLRB that the activity here is primary. The NLRB erred in omitting consideration of the employees who are beneficiaries of the trust fund but are not members of the same bargaining unit which negotiated with Griffith. There are a handful of large multi-employer union bargaining units (which negotiated the Master Labor Agreement with the large contractors associations) and a large number of single-employer union bar-

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[11]The administrative law judge considered this issue at some length. The parties offered various proposals ranging from work units limited to the employees of one employer to one industry-wide work unit. The administrative law judge held, however, that prior NLRB decisions dictated that the relevant work unit be equivalent to the corresponding bargaining unit. *See Raymond O. Lewis*, 148 NLRB 249, 253-54 (1964), *remanded sub nom. Lewis v. NLRB*, 122 U.S.App.D.C. 18, 350 F.2d 801 (1965), *on reconsideration sub nom. W. A. Boyle*, 179 NLRB 479 (1969), *petition for review dismissed as moot sub nom. UMW v. NLRB*, 152 U.S.App.D.C. 82, 468 F.2d 1139 (1972); *but see* Note, *A Rational Approach, supra* note 10, 57 Va.L.Rev. at 1291-97. The NLRB accepted this ruling and it has not been challenged on review.

The administrative law judge may have misused the work unit concept. Work units have in the past been defined solely for use in considering the allocation of benefits of a challenged labor practice: in order for the practice to be considered primary, it must benefit mainly employees in the work unit (although not necessarily employees of the employer against whom the action is taken). *See id.* at 1290-94. However, the administrative law judge seemed to apply the concept in considering the tactical object of the Union's action. He apparently assumed that if two employers contract with the same bargaining unit, the Union may coerce one into ceasing to do business with the other where the object is interference with the labor relations of the other regardless of the allocation of benefits. On the basis of this assumption, he thought it would be anomalous to rule the boycott of Urban Pacific illegal since the Union would still be allowed to coerce Griffith into boycotting delinquent contractors in Griffith's bargaining unit. The propriety of the administrative law judge's assumption is not before us and we express no opinion on it. We note only that there is no precedent for this surprising assumption and that we consider it an open issue.

gaining units (which negotiated short form agreements with individual contractors). Thus the critical question is not whether the agreement was substantially for the benefit of the employees of all contracting employers, as the NLRB phrased it, but whether the agreement was substantially for the benefit of the employees in Griffith's employees' work unit as opposed to the members of the Union generally.

This question must be answered in the negative. Employees of many work units are beneficiaries of the trust funds and the burdens of delinquencies in trust fund contributions are shared equally by all. By withholding services from contractors doing business with delinquent subcontractors with the object of eliminating those delinquencies, the Union seeks to benefit not only the contractors' work unit, but all its members who may become eligible to receive funds from the trusts. The NLRB did point out that the clauses challenged here may not benefit Union members generally because unemployed Union members who do not qualify for fringe benefits may not have an interest in seeing that delinquencies are remedied. But we do not think that this is an important factor. What is critical is that the benefits sought to be achieved by the clauses extend far beyond the relevant work unit and that the benefits conferred on the work unit are no more "direct"[12] or substantial than those

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[12]We reject the NLRB's argument that the "directness" of the effect on the work unit employees is decisive. The NLRB argues that the effect of Urban Pacific's delinquency on Griffith's employees' fringe benefits is more direct than the effect of subcontracting unit work in violation of union standards or work preservation clauses which have been held primary. But we do not real *National Woodwork* as requiring any metaphysical inquiry into the relative degrees of directness of causation. Some commentators have distinguished between direct and indirect benefits to unit employees in distinguishing primary from secondary activity, *see, e.g.*, Note, *A Rational Approach*, *supra* note 10, 57 Va.L.Rev. at 1298; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv.L.Rev. 1086, 1119 (1960), but they use the terms differently from the NLRB. An effect is "direct" if the bargaining unit is benefited in some special way and "indirect" if the bargaining unit is benefited only because of some general benefit conferred upon the union. Under this scheme, the effects on Griffith's employees of Urban Pacific's delinquencies are, if anything, less direct than in the work preservation and union standards cases because the effect on them is no different from the effect on all other employees who are beneficiaries of the trusts.

conferred on the other units.[13] Thus we conclude that the

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[13]The administrative law judge found, and the Union and the trustees argue on review, that the agreement here comes within the well-established exception to section 8(e) for union standards clauses. The NLRB was correct in not relying on this ground.

A typical union standards clause prohibits subcontracting of unit work to any employer whose employees' wages, hours and working conditions are less favorable than those enjoyed by the union. Such clauses are generally held primary because they are usually designed to protect the wages and conditions achieved by the union in bargaining and to preserve unit work by removing the incentive for the employer to subcontract unit work to "sub-standard" contractors in order to avoid paying union terms. *See, e.g., Teamsters Local 413 v. NLRB*, 118 U.S.App.D.C. 149, 334 F.2d 539, 548, *cert. denied*, 379 U.S. 916, 85 S.Ct. 264, 13 L.Ed.2d 186 (1964); *see generally* Goetz, *Secondary Boycotts, supra*, 19 Kan.L.Rev. at 690-92; ABA, Labor Law, *supra*, 658-64.

The administrative law judge concluded that Paragraphs 15 and 16 of the Master Labor Agreement "realistically do function as union standards clauses." He noted that an employer who does not intend to make required trust fund contributions can bid lower for subcontracts than one who intends to make the payments. By making prime contractors liable for their subcontractors' delinquencies, he reasoned that the Master Labor Agreement cancels the delinquent employer's bidding advantage and removes the economic incentive to contract with such employers. Thus he held that the clauses preserve the work of the employees of the prime contractors and non-delinquent subcontractors and protect the fringe benefits of all.

It is clear to us, however, that these are not primary union standards clauses. First, a primary clause seeks to protect only work traditionally performed by the unit. Here there is no contention that the work subcontracted to Urban Pacific was ordinarily accomplished by Griffith's employees and the administrative law judge did not so find. He found that the Union's motive was to protect the work not only of Griffith's employees' work unit, but of the employees of all non-delinquent employers, generally a secondary objective.

Moreover, we doubt that the record supports the administrative law judge's conclusion that the Union seeks to preserve work for employees of non-delinquent employers at the expense of employees of delinquent contractors. The latter are Union members too and the Union should be as desirous of protecting their work as the work of the employees of nondelinquents. Indeed, the Union's policy of protecting the fringe benefit eligibility of the delinquent contractors' employees is inconsistent with the desire found by the administrative law judge not to protect those same employees' jobs.

For similar reasons, we do not find much assistance in decisions involving the much-litigated "80-cent clause" of the 1964 amendment to the National Bituminous Coal Wage Agreement of 1950. That clause required employers to contribute to fringe benefit trusts 40 cents per

(footnote continued on following page)

agreements and their enforcement constitute unlawful secondary activity.

The NLRB stressed, however, the desirability of fringe benefit programs. Borrowing some language from *National Woodwork*, see 386 U.S. at 642, 87 S.Ct. at 1267, the NLRB concluded that it "should not lightly impute to Congress in Section 8(e) an intent to hinder or impede such necessary and commendable efforts to guarantee employees these ancillary benefits." But the reasoning of *National Woodwork* does not support this conclusion. We do not read it as construing section 8(e) to prohibit only secondary activity for undesirable or reprehensible ends. Congress has over the years struck a delicate balance of power between labor and management. Unions may engage in concerted coercive activities against primary employers only; secondary pressures are forbidden even where a union has the commendable objective of improving the wages and working conditions of union members generally.

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ton of coal produced and 80 cents per ton of coal acquired from non-union producers. The NLRB upheld the provision as a primary union standards clause since it found that the 80-cent surcharge was roughly equivalent to the differential between union and non-union wages and that the union's object was to remove the incentive for substituting coal purchased from non-union mines for coal previously mined by the union. *United Mine Workers*, 188 NLRB 753, 754 (1971), *petition for review dismissed for lack of jurisdiction*, 152 U.S.App.D.C. 82, 468 F.2d 1139 (1972). The Sixth Circuit disagreed. It concluded that there could be no work preservation motive since the employer could comply with the clause by firing all its employees and buying all its coal from other signatory mines. It thought instead that the union sought by the clause to induce non-union mines to become unionized, a secondary motive. *Riverton Coal Co. v. UMW*, 453 F.2d 1035, 1040-41 (6th Cir.), *cert. denied*, 407 U.S. 915, 92 S.Ct. 2439, 32 L.Ed.2d 690 (1972).

Each party relies heavily on whichever of these cases supports its respective position, but even if we were to accept the view of the NLRB, which we specifically do not decide, it would make no difference here because the 80-cent clause is distinguishable. Because the 80-cent penalty was imposed on coal produced from non-union suppliers, it is at least arguable that the union's motive is protection of unit work. But here the Union's object is not protection of unit work, but remedying the default of a third-party contractor. This is a secondary object.

Nor do we understand how the clauses challenged here are "necessary" to guarantee the employees maximum fringe benefits. The Union argues that many delinquent employers are "fly-by-night" enterprises which do business out of post office boxes and often change their names and locations to avoid suits to enforce their contractual obligations. The Union notes that when the Urban Pacific delinquency was first discovered, Urban Pacific could not be found. It is indeed difficult to bring *any* pressure, primary or secondary, on an elusive delinquent employer, but once Urban Pacific was discovered working on Griffith's construction site, primary and secondary pressures both became possible and there is no reason why secondary pressures were necessary.[14] The Union had the right to withhold its services from Urban Pacific, although it did not exercise that right here, and such a primary strike should be as effective in inducing Urban Pacific to cure its delinquency as the secondary pressures threatened in this case. Alternatively, the Union could have brought suit for the delinquency once Urban Pacific was located. Finally, the Union could avoid dealing with the "fly-by-night" subcontractors altogether. At the very least, the Union could ask them to disclose their business address and telephone number and the names and addresses of their principal officers, to designate a reliable agent for the service of process, or to post a security bond for fringe benefit contributions before agreeing to supply union labor.[15]

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[14]An example of a less coercive method was given tacit approval by the Supreme Court in *Walsh v. Schlecht*, ___ U.S. ___, 97 S.Ct. 679, 50 L.Ed.2d 641 (1977).

[15]A performance bond is a permissive bargaining subject. The union can therefore ask employers to post a bond which will be legally enforceable. Bonding is not a mandatory subject, however, and the union cannot insist on a bond to the point of an impasse in the negotiations and cannot strike over the issue. *NLRB v. Hod Carriers Local 1082*, 384 F.2d 55 (9th Cir. 1967), *cert. denied*, 390 U.S. 920, 88 S.Ct. 853, 19 L.Ed.2d 980 (1968).

In short, we see no reason for creating a new exception to section 8(e) for secondary fringe benefit trust contribution enforcement clauses beyond the narrow exception created by a bare majority of the Supreme Court for primary work preservation clauses in *National Woodwork*.

IV. Remaining Issues

Since the NLRB concluded that the clauses and their enforcement were lawful primary activity, it did not reach a number of other issues raised by the parties. The Union and the trustees argued that even if the clauses are secondary, they are valid under the construction industry exception to section 8(e).[16] Because clauses within the proviso may be enforced only by judicial means and not by economic coercion, *NLRB v. IBEW Local 769*, 405 F.2d 159, 163 (9th Cir. 1968), *cert denied*, 395 U.S. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969), this is a defense only to the charge of violating section 8(e) and not 8(b)(4). Griffith responds that the proviso sanctions only clauses which require subcontractors to be parties to contracts with the Union and not those which require that they be in compliance with such contracts. Griffith also notes that a clause otherwise within the proviso is invalid if it provides for union self-help in enforcement. *Id.* at 163-64. As the NLRB should have the opportunity to consider these issues first on remand, we do not reach them at this time.

With respect to the section 8(b)(4) charge, the Union and the trustees argue that the only threats alleged were made by the trust funds' administrator and attorney who are not the Union's agents. They note that the trust funds are administered by trustees drawn equally from labor and management pursuant to 29 U.S.C. §186(c)(5) and that em-

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[16]See note 5 *supra*.

ployees of the trustees are held to the same fiduciary duties to the beneficiaries of the trusts as the trustees. Thus they urge that the trustees and their employees are not agents of the Union. The NLRB will have to consider this issue on remand.

The NLRB's decision that the agreements and their enforcement are lawful primary activity is reversed and the case is remanded to the NLRB for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX D.
Decision and Order

International Union of Operating Engineers, Local Union No. 12 *and* Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; Sukut-Coulson, Inc.; and V & L Construction Co., Inc. International Union of Operating Engineers, Local Union No. 12 *and* Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; and Sukut-Coulson, Inc. and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; and Engineering and Grading Contractors Association, Inc., Parties to the Contract. Cases 21-CC-1451 and 21-CE-126. June 28, 1974.

On September 17, 1973, Administrative Law Judge, Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Parties filed exceptions and supporting briefs, the Respondent Union and the Intervenors filed answering briefs, and the Intervenors filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order with the following modifications and additions.

In this case the General Counsel has alleged that the Respondent Union violated Sections 8(e) and 8(b)(4)(ii)(B) of the Act by entering into, maintaining, and enforcing certain provisions in its Master Labor Agreement, more specifically set forth in the attached Administrative Law Judge's Decision, whereby the contracting employers agree not to subcontract work to any subcontractor whose name appears on a monthly list of employers delinquent in their

payments to the several fringe benefit trust funds jointly maintained and administered by the Union and the signatory Employers.

The General Counsel contends that Urban Pacific, the delinquent subcontractor, is the only employer with which the Union has a legitimate, primary labor dispute and the Charging Parties, who are not themselves in default in their payments to the trust funds, are neutral, secondary employers entitled to the protection of the statute. In support of this contention the General Counsel points out that these employers are required under the challenged contract to pay not only the delinquency incurred by Urban Pacific on their jobs, but all preexisting amounts owed the trust funds from previous jobs with other contractors.

It may be conceded on this record that the above contractual provisions and the trust fund administrator's efforts to enforce them with respect to Urban Pacific contemplate that contractors, signatory to the Union's Master Labor Agreement, would cease doing business with that delinquent subcontractor. While it is clear that Urban Pacific is a primary employer, subject to the thrust of the Union's contractual and economic force, it does not follow that contractors doing business with Urban Pacific are, as the General Counsel asserts, neutral employers uninvolved in the Union's dispute over delinquent payments to its trust funds.

The critical question to be determined in this case is not the degree or nature of the Union's restraint against the Charging Parties or Urban Pacific's status as a primary employer, but whether in the circumstances of this case it can fairly be held that the agreement subscribed to be [*sic*] all contracting employers was substantially in the interest and for the protection of the employees of those employers. Accepting, as we did, the Administrative Law Judge's con-

clusion that the record will not support a finding of a single, industrywide bargaining unit,[1] the answer to this question must be in relation to multiple units of employees whose employers have bound themselves to a voluntary union-employer procedure for the collection of delinquent payments to the trust funds. We agree with the Administrative Law Judge that this question should be answered in the affirmative.

It is by now well established that every bargaining contract with a "cease doing business" objective, although literally within the proscription of Section 8(e) of the Act, is not necessarily unlawful. The Board and the courts have held that a union may lawfully require a contracting employer to cease or refrain from doing business with another employer if the union's objective properly falls within certain carefully delineated exceptions, such as "work preservation"[2] and maintenance of "union standards."[3] Such

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[1]In this respect we do not adopt the Administrative Law Judge's comments and appraisal of the Decision of the Administrative Law Judge in *Joint Council of Teamsters No. 42, IBT, Merle Riphagen*, 212 NLRB No. 5 (1974).

[2]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967); *Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B.*, 328 F.2d 543 (C.A.D.C., 1964). Contrary to our dissenting colleagues, the Supreme Court has held that the issue of voluntarism with respect to a proper interpretation of Sec. 8(e) is relevant and material. In *National Woodwork, supra*, the Court specifically pointed out that the legislative history of Sec. 8(e) was silent with respect to a congressional purpose of "curtailing the ability of labor and management *voluntarily* to negotiate for solutions" to the problems of automation and onrushing technology. (Emphasis supplied.) In the absence of this history the Court concluded that Sec. 8(e) did not prohibit voluntary agreements directed to work preservation. This is the clear and explicit language of the Supreme Court, which has not been altered by Congress.

To suggest, as our dissenting colleagues do, that there is a material distinction between voluntary work preservation agreements and voluntary secondary boycott agreements, so far as the effect on the secondary employer is concerned, reduces the argument to a question of semantics. Clearly, in both situations enforcement of the agreement

(footnote continued on following page)

cases, unlike the instant case, have generally involved attempts to prevent a contracting employer from doing business with a nonunion subcontractor. The difference here is that all involved employers are signatory to the Union's contract and have agreed not to do business with each other if one of them is delinquent. While the context is unusual, it should not diminish our examination of the Union's objective with respect to each unit of employees whose employer has been required to cease doing business with a delinquent subcontractor.

In concluding that the General Counsel has not established a violation of the statute in this case the Board has been cognizant of the great strides made by unions and employers in the area of fringe benefits for employees, such as the health and welfare, pension, vacation, and apprenticeship programs in this case. As the Supreme Court noted in *National Woodwork Manufacturers Association v. N.L.R.B.*, *supra*, with respect to the efforts of unions and employers to treat the problems of technology and automation, the Board should not lightly impute to Congress in Section 8(e)

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results in a cessation of business between two employers, one of whom may be considered secondary. The Supreme Court went to great lengths in the *National Woodwork* case to point out that the legality of such an agreement cannot and does not depend upon the literal language of Sec. 8(e). In that case the Court upheld the legality of a voluntary agreement requiring an employer, at the insistence of a union representing carpenters, to cease doing business with neutral suppliers of prefabricated doors. The Court was gravely concerned with the impact of automation on the ability of union craftsmen to earn a living at their traditional craft and largely for that reason held that Sec. 8(e) should not be interpreted to prohibit such voluntary agreements between a union and a contracting employer. We believe the same reasoning should apply in the instant case, particularly where, as here, all employers affected have signed the same restrictive agreement relating directly to the pension and welfare benefits of their own employees as well as the employees of others.

[3] *International Union, United Mine Workers of America (Dixie Mining Company)*, 188 NLRB 753 (1971); *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, Teamsters [Wilson & Co.] v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964); *Truck Drivers Union Local No. 413, Teamsters [Brown Transport Corporation] v. N.L.R.B.*, 334 F.2d 539 (C.A.D.C., 1964).

an intent to hinder or impede such necessary and commendable efforts to guarantee employees these ancillary benefits. We need not and do not pass on the validity of restrictive agreements in industries other than the construction industry or in circumstances different from those in this case. Here at least it is clear that a substantial number of the Union's members work from job to job and from contractor to contractor with no certainty that they will remain employed in any particular unit for any period of time. Without a trust fund arrangement encompassing the interests of employees of all employers involved, no unit of employees can be assured that funds will be available for medical emergencies or for retirement. Surely, this is not a case where the Union has sought to protect the interests of union members generally, whether or not employed by a contracting employer. This agreement and its maintenance is addressed solely to the labor relations of the contracting employers vis-a-vis their own employees. As such, it satisfies the touchstone of legality set forth by the Supreme Court in *National Woodwork, supra*. It may be argued that the delinquency of a single subcontractor, such as Urban Pacific, is not such an impediment to the existence or solvency of the trust funds to warrant the drastic procedure of a restrictive covenant operating against all other contractors. But the way is not open to disregard the delinquency of one subcontractor without disregarding the delinquencies of all others. Totaled together, the impact of many delinquent subcontractors doing business with impunity in this industry would be destructive of the entire trust fund plan. The administrator for the trust funds testified that inability to collect funds for the health and welfare fund at one time sharply affected the solvent status of that fund. The trustees were required to borrow $2 million, change carriers, cut medical benefits, and reduce costs in every possible manner. There-

after, benefits available under this plan were improved as a result of stepped-up collection procedures, including enforcement of the restrictive covenants against delinquent contractors.

On the basis of the foregoing we conclude that the agreement of the Charging Parties not to do business with delinquent subcontractors and the trust fund administrator's invocation of that agreement with respect to Urban Pacific was primary conduct, relating directly and immediately to the interests and conditions of employment of the employees in each unit of contracting employers involved in this case. We shall therefore dismiss this complaint in its entirety.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Chairman Miller and Member Kennedy, dissenting:

For the reasons set forth in our dissent in *Joint Council of Teamsters No. 42, et al. (Merle Riphagen)*, 212 NLRB No. 5, issued today, we dissent from our colleagues' dismissal of the 8(b)(4)(ii)(B) and 8(e) complaint herein, and would find the alleged violations of the Act.

DECISION OF ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

Maurice M. Miller, Administrative Law Judge: Upon charges and amended charges filed and duly served, the General Counsel of the National Labor Relations Board has

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[4]Member Jenkins concurs in dismissing the complaint herein for the reasons stated by him in *Joint Council of Teamsters No. 42, International Brotherhood of Teamsters (Merle Riphagen)*, 212 NLRB No. 5.

issued a consolidated complaint and notice of hearing against International Union of Operating Engineers, Local Union No. 12, designated as Respondent Union herein, under Section 10(b) of the National Labor Relations Act, as amended. Griffith Company, designated as Griffith hereinafter, J. W. Nicks Construction Co., Security Paving Co., Inc., Sukut-Coulson, Inc., and V & L Construction Co., Inc., all collectively designated as Five Contractors hereinafter, had filed their initial CC and CE charges on March 8, 1973. Thereafter, amended charges in Case 21-CE-126 had been filed on April 26 and May 4 respectively. General Counsel's consolidated complaint and notice of hearing issued May 7, 1973; copies thereof were, subsequently, duly served. Within General Counsel's consolidated complaint, Respondent Union has been charged with unfair labor practices affecting commerce under Section 8(b)(4)(ii)(B) and 8(e), and Section 2(6) and (7) of the statute. (61 Stat. 136, 73 Stat. 519.) Respondent Union's answer, duly filed, concedes certain factual matters set forth within General Counsel's consolidated complaint; Respondent Union has, however, denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Los Angeles, California, on June 21 and 22, 1973, before me. The General Counsel and Respondent Union were represented by counsel. When the hearing convened, counsel representing 21 trustees of the Operating Engineers health and welfare, pension, vacation-holiday, and apprentice training trust funds filed a motion to intervene. The motion was granted; thereafter, Intervenor's counsel participated actively throughout the hearing. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Since the hearing's close, briefs have

been received from General Counsel's representative, together with Intervenor's and Respondent Union's counsel. These briefs have been duly considered.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

I. JURISDICTION

Respondent Union has raised no question herein with respect to General Counsel's jurisdictional claims. Upon the consolidated complaint's relevant factual declarations, I make the following factual determinations.

Associated General Contractors of California, Inc., herein called AGC; Building Industry Association of California, Inc., herein called BIA; and Engineering and Grading Contractors Association, Inc., herein called EGCA, are trade associations of contractors, comprised of numerous employer members, which exist for, and engage in, collective bargaining; they negotiate collective-bargaining contracts on behalf of their respective employer members with various labor organizations, including Respondent Union herein. Throughout the period with which this case is concerned, Griffith, Nicks, and Security, California corporations, have been AGC employer-members. The various contractor members of AGC, BIA, and EGCA, for whom these trade associations have jointly negotiated and signed a multiemployer, multiassociation contract with Respondent Union herein—which group includes Griffith, Nicks, and Security previously noted—are currently engaged in business within southern California as building and construction industry contractors. They maintain their principal offices and places of business within the State of California; taken as a group,

they purchase and receive supplies valued in excess of $50,000 annually, which come to them directly from out-of-state suppliers.

Sukut-Coulson and V & L Construction, California corporations, likewise maintain their principal offices and places of business within that State; they are likewise engaged in business as southern California building and construction industry contractors. Each purchases and receives supplies valued in excess of $50,000 annually, directly from out-of-state suppliers.

Urban Pacific Corp. and Gary M. Budd, Jim Comaianni Construction Co., a joint venture; Urban Pacific Construction Co., Inc.; Urban Pacific Construction Co.; Jim Comaianni Construction Co.; Jim Comaianni Construction Company & Urban Pacific Const. Co., Inc., a joint venture; Urban Pacific Corp.; Lark Construction Co., Inc.; Jim Comaianni Construction Co. and Urban Pacific Construction Co., a joint venture; Urban Pacific Construction Co., Inc. and Jim Comaianni Construction Co., *et al.;* Urban Pacific Construction Co., Inc. and Jim Comaianni, a joint venture—collectively designated as Urban Pacific herein—are, and have been, at all times material herein, engaged in business as southern California underground piping and sewer-laying contractors, serving the building and construction industry. At various times, during the period with which this case is concerned, the Five Contractors previously designated have subcontracted to Urban Pacific the performance of underground piping and sewer-laying work at several southern California construction projects.

With matters in this posture, I conclude and find that the various employer members of AGC, BIA, and EGCA, including Griffith, Nicks, and Security particularly, together with Sukut-Coulson and V & L Construction, are, and have been, at all times material, employers engaged in commerce

or in a business affecting commerce within the meaning of Section 8(e) of the Act, and persons engaged in commerce or in an industry affecting commerce within the meaning of Section (b)(4)(ii)(B) of the statute. Likewise, I conclude and find that Urban Pacific is, and has been, at all times material, a person engaged in commerce or in an industry affecting commerce within the meaning of these designated statutory provisions. With due regard for presently applicable jurisdictional standards, I find the proposed assertion of Board jurisdiction, in this case, warranted and necessary to effectuate statutory objectives.

II. RESPONDENT UNION

International Union of Operating Engineers, Local Union No. 12, designated as Respondent Union within this decision, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits to membership certain employees of various AGC, BIA, and EGCA employer-members, Sukut-Coulson, V & L Construction, and Urban Pacific respectively.

III. THE UNFAIR LABOR PRACTICES

A. *Issues*

General Counsel charges Respondent Union with unfair labor practices, bottomed on certain provisions of Respondent Union's current contract with the particular contractor associations previously designated, together with certain conduct, purportedly undertaken in Respondent Union's behalf, consistent with those provisions.

The contractual clauses in question are characterized as violative of Section 8(e) of the statute, *per se*, because their thrust, realistically considered, is purportedly secondary in nature, and because they cannot be considered privileged

by the designated section's construction industry proviso. Further, General Counsel charges Respondent Union with responsibility for a demand—purportedly made by representatives of the Operating Engineers health and welfare fund, pension trust, vacation-holiday fund, and Southern California Operating Engineers apprentice training trust, collectively designated as trust funds herein, functioning in Respondent Union's behalf—that the Five Contractors should pay the trust funds certain *pro rata* sums sufficient to cover delinquent contributions which various Urban Pacific enterprises purportedly owe these funds. Within his complaint General Counsel charges that Respondent Union, through its statutory agents, more particularly, the trust funds noted, threatened to strike and shut down all southern California construction projects of these Five Contractors where employee members of Respondent Union were then working, should these Five Contractors fail to proffer the contributions specified. Respondent Union's demand, coupled with its purported threat, is characterized as violative of Section 8(b)(4)(ii)(B) of the statute.

Respondent Union contends that the contractual provisions herein challenged should be considered primary in nature; that they were drafted and negotiated by spokesmen for the contractors associations and Respondent Union merely to protect the work and fringe benefit standards previously established for workers compassed [*sic*] within the questioned contract's so-called "principal work unit" particularly; and that both the challenged contract provisions and consequent trust fund efforts to invoke or enforce them should, therefore, be considered lawful. No significant conflicts have been presented for Board resolution with respect to the actual situation giving rise to the present controversy; the present record, therefore, presents nothing more than a legal question.

B. *Facts*

1. The master labor contract

The contract with which we are presently concerned is designated the master labor agreement between southern California general contractors and Respondent Union. It was negotiated and signed with a July 1, 1969, effective date, to remain in effect until July 1, 1974, with a conventional renewal provision calling for its continuation, under certain circumstances, from year to year thereafter. The contractor members of the various trade groups privy thereto, previously noted generally, are engaged in construction, survey work, and asphalt production within 11 contractually specified southern California counties, exclusive of San Diego County; the master contract purports to cover persons working for these contractors, within Respondent Union's recognized jurisdiction, both on construction jobsites and within the particular contractors' yards and shops. Its worker coverage includes a wide variety of job classifications, defined and compassed within nine contractually specified groups. With respect to persons performing work within these given job classifications, the master contract contains detailed provisions governing their wages, hours, and working conditions, together with union recognition, strike-lockout, and jurisdictional dispute clauses, grievance settlement provisions, and certain further provisions conventionally found in collective-bargaining contracts. The agreement, likewise, provides various fringe benefits for covered workers; specifically, these fringe benefits compass a health and welfare plan, pensions, and pay for vacations and holidays.

Since many workmen, within the building construction industry, frequently shift their employment from one contractor to another as various construction projects start and

finish, a method has been provided whereby such workmen may receive proper credit for their earned fringe benefits. This is currently being done, pursuant to several separate agreements and declarations of trust previously negotiated, by requiring each contractually covered employer to file regular monthly reports, listing the hours worked by his employees within contractually designated job classifications; and to pay separately computed sums calculated with regard for the total number of monthly hours which such employees may have worked into trust funds which Respondent Union and the various contractors associations maintain and jointly administer. In turn, these trust funds are required, pursuant to their respective trust agreements previously noted, to credit their records, separately maintained for each workman listed, with the total monthly working hours which his employer may have reported, and to disburse earned benefits pursuant to the terms and conditions defined therein.

Should any contractor bound by the southern California master labor agreement become delinquent with respect to trust fund contributions, the concerned fund or funds must report such a delinquent contractor to each contractors association and Respondent Union, monthly. Preliminarily, however, the master labor agreement provides, within article I, paragraph B-14, that the trustees of the trust funds, through their administrator regularly retained:

> . . . shall give written notice to a delinquent Contractor or Subcontractor, with a copy to the Union, advising him to correct a delinquency within ten (10) days of the giving of such notice. The Union shall withhold services from any or all jobs of such delinquent Contractor or Subcontractor after said ten (10) day period if the delinquency is not corrected. . . .

The trust funds administrator, likewise, may, following a failure of negotiations or consultation with any contractor looking toward the collection of his purportedly delinquent payments, commence legal proceedings against such a delinquent contractor. The master labor agreement, however, provides further that trustees of the trust funds, through their administrator duly designated, may initiate procedures whereby contractually committed contractors may become liable for various accrued or current delinquencies of their subcontractors, likewise covered by the master labor agreement with which we are now concerned. The relevant clauses in this connection are the clauses which General Counsel has, herein, challenged; they read in full as follows:

> Article I, Paragraph B-15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.
>
> (a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V [procedure for settlement of grievances and disputes] of the Agreement.
>
> 16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date

of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

On their face, these clauses seemingly require a prime or general contractor to refrain from subcontracting any portion of his current project or projects with another contractor—likewise bound by the master labor agreement herein—listed as delinquent within any previously disseminated trust fund delinquency list, unless such a listed contractor has, since the list's dissemination, settled his trust fund delinquencies. Should the prime or general contractor, nevertheless, negotiate a subcontract with a previously listed delinquent firm, that prime or general contractor will, essentially, become a guarantor for his newly engaged subcontractor's previously "accrued" delinquencies. When a previously nondelinquent subcontractor, however, becomes delinquent after commencing his work for a prime or general contractor, the latter may become liable merely for "delinquencies incurred on the job" following a contractually defined grace period.

These quoted contractual provisions are clearly designed to serve a dual purpose. *First:* They define the means whereby the trust funds administrator, together with concerned prime contractors, may put pressure on some delinquent subcontractor to remedy his own delinquency, whereby the possible loss of his current subcontract may be forestalled. *Second:* They promote compliance with certain procedural steps reasonably calculated to safeguard the fringe benefit eligibility prospects of the particular subcontractor's

concerned employees, while promoting the financial integrity of the trust funds involved by insuring that, if such a subcontractor cannot or will not settle his contribution delinquencies, another responsible party will in his stead provide the trust funds with the requisite sums due.

The General Counsel essentially contends, herein, that these contractual provisions, by virtue of their specific language or those foreseeable consequences which would necessarily follow their projected implementation with respect to particular situations, have a secondary thrust, since they expressly require a prime or general contractor to "cease doing business" with the subcontractor with whom Respondent Union may have a primary dispute, and since they penalize him financially should he thereupon fail to terminate their business relationship.

2. The short-form contracts

All contractor members of the three trade associations previously noted are concededly bound by the master labor agreement's provisions with respect to work performed within the 11-county southern California territory which that contract covers. In addition to such contractors association members, however, other persons—likewise engaged in building and construction industry work with this self-same southern California territory—may become parties to the master labor agreement by signing so-called "Short Form" contracts. These substantially paraphrase most of the master labor agreement's provisions, or may adopt them by reference. Signatory contractors, thereby, recognize Respondent Union as the statutory representative of their employees, and agree to be bound by most of the master labor agreement's terms; their commitments, *inter alia*, compass a contractual obligation to make required monthly reports

and submit contributions, payable to the trust funds, for their employees' vacation and holiday pay, health, and welfare coverage and pension benefits.

3. The trust funds

a. *The structure of the funds*

Though the master labor agreement refers to the trust funds and contains provisions dealing with the handling of delinquencies, the Operating Engineers health and welfare fund, pension trust, vacation-holiday savings trust, and Southern California Operating Engineers apprentice training trust were each created by separately executed agreements and declarations of trust signed by Respondent Union, the three trade associations previously noted or their predecessors, and several additional contractor groups. Since these trust funds were established at various times between 1954 and 1964, the contractors association parties initially privy to their agreements and declarations of trust vary. Most were established by Respondent Union in conjunction with contractors association groups which included, but were not limited to, those privy to the master labor agreement with which we are herein concerned. The parties have stipulated that the trust funds in question were created, pursuant to 29 U.S.C. §186(c)(5) and (6), to receive and hold in trust fringe benefit contributions payable under various collective-bargaining contracts, including the southern California master labor agreement currently in force. Each fund is controlled by a board of trustees, with equal numbers of union and contractors association members. The several trustees are appointed by the contractors associations and Respondent Union respectively. They serve until death, incapacity, resignation, or removal. Trustees may, however, be removed at will, with or without cause, by the party responsible for their designation. Substantially, the several trust

declarations vest each designated board of trustees with power and responsibility for "the continuing supervision, control and direction of [the designated fund] for the uses, purposes, and duties set forth" therein. The several boards, therefore, are responsible for collections, investments, settlements of benefit schedules, and disbursements thereunder.

The four boards, since September 1, 1972, specifically, have (so the record shows) contracted with a tax exempt, nonprofit service corporation, designated as Southern California Operating Engineers Benefits Administration, Inc., for the diurnal conduct of trust funds operations. In turn, that corporation currently hires a trust fund administrator, together with his required staff personnel—some 70 in number—for the purpose of conducting the trust funds day-to-day business. The corporation has a board of trustees which consists of trust fund trustees. All trust fund trustees are "members" of the corporation. The administrator provides services of a ministerial nature to the several boards of trustees, whereby their regular functions can be discharged. *Inter alia*, the Administrator is responsible, subject to the discretionary authority and supervision of a committee of trustees, called the joint contribution committee, representing the several boards of trustees concerned, for the collection of regular payments from those employers who are collectively committed to make trust fund contributions, pursuant to their collective-bargaining contracts with Respondent Union herein.

b. *The coverage of the funds*

As previously noted, the trust funds were created by a number of contractors associations, with AGC, BIA or its predecessor, and EGCA constituting merely a portion of the total number of employer groups concerned. Currently, so

the record shows, the trust funds receive contributions pursuant to various collective-bargaining contract commitments —totalling approximately $5 million per month—from some 2,500 general and specialty contractors. The collective-bargaining contracts mentioned specifically obligate the contractors privy thereto to "abide by" the provisions of the several trust agreements, and to pay contributions at hourly rates stated therein. On July 1, 1973, the contribution rates per employee totalled $2.57 per hour worked, distributed as follows: $.75 to the health and welfare fund; $1.50 to the pension trust: $.30 to the vacation-holiday savings trust: and .02 to the apprentice training trust. A substantial number of these contractors—not specified for the record —are contractually committed through some 11 general contractors associations, which represent and bargain for firms doing business throughout San Diego County, 11 other southern California counties, and southern Nevada specifically. Others are contractually committed through their membership in, and representation by, various specialty contractors associations. Many contractors are committed to make trust fund contributions, however, by virtue of their contractual privity with Respondent Union pursuant to "Short Form" contracts separately negotiated.

The record reflects a purportedly "informed" guess that some 40,000 workmen, represented for collective-bargaining purposes by Respondent Union herein, currently hold hourly "credits" recorded in separately maintained accounts with the Operating Engineers health and welfare, pension, and vacation-holiday trust funds, by virtue of their work histories with contributing contractors; they constitute, therefore, these fund's current and prospective beneficiaries. Not all such workmen, however, are currently employed with southern California or Nevada firms. During an average month the trusts receive reports and contributions on some

25,000 workmen. Some are normally peripatetic, and may at various times work both within and without the geographical territory with which we are concerned; other workers, who may have worked in southern California previously, may have since left the territory, or given up positions within the southern California building and construction industry, without accumulating sufficient hourly work credits to qualify for those fringe benefits which the trust funds provide. Their records are maintained by the various trust funds, nevertheless.

Under the particular master labor agreement with which we are presently concerned, some 17-18,000 southern California workers are represented and may qualify for trust fund coverage. The record provides no basis for a determination with respect to how many of these may be acquiring hourly work "credits" recorded by the various trust funds through current employment with AGC, BIA, or EGCA members contractors. Leo A. Majich, the trust funds administrator, declared his belief, however, that some 60 percent of the contributions received for work done within the 11-county territory covered by the master labor agreement are received form [*sic*] AGC, BIA, and EGCA members contractors who do most of southern California's major construction work, with most of the remaining 40 percent being received from "Short Form" signatory firms.

c. *Procedures with respect to delinquency collections*

One function of the trust funds administrator necessarily relates to the collection of delinquent contributions. Contractors bound to provide contributions pursuant to collective-bargaining contracts (designated, throughout the present record, as signatory contractors) received blank forms mailed monthly from the trust funds office, wherein they may report the names of their "operating engineer" work-

ers, and their hours worked, during the previous month. These forms, properly completed, must be returned—with the concerned contractor's contribution check—not later than the 20th day following the conclusion of the month covered thereby; reports are considered delinquent if they have not been received by that date. Contribution payments, when received, are deposited, for each trust, within that particular trust's "common pool" bank savings account; no separate records are maintained regarding the total contributions thereto made by particular contributing employers. Should a contractor neglect or fail to file his report, submit it late, fail to report correctly the hours worked by his employees, or fail to attach his properly computed payment for the full contribution amount required, the administrator's office will seek to resolve any possible "clerical errors" or "minor problems" through a telephone contact. Should such a contact, however, reveal a problem more substantial than clerical error, which the contractor may not be prepared to resolve, the trust funds will issue a so-called "Ten Day Delinquency Notice" directed to him, with a copy to Respondent Union herein. Should the contractor, thereafter, fail to remove his delinqueny within the designated 10-day period, his firm will be placed on the funds' official delinquency list, dispatched to the concerned contractors associations, Respondent Union and other interested signatory employers, pursuant to article I, paragraph B-15 of the master labor agreement, previously noted. The master labor agreement requires the publication of a delinquency list monthly; in practice, however, such lists are currently being prepared and published weekly.

When the health and welfare fund was initiated (1954), hourly contributions were quite low; over the years, with new trusts established and contribution rates raised, they have increased substantially. The record warrants a deter-

mination, which I make, that the degree of delinquency with respect to various trust fund contributions, and the total sums involved, have become "bigger problems" with the passage of years, as fringe benefit contributions have become a larger and larger part of the total "cost package" which contributing contractors have been required to sustain. By June 14, 1973, the total *known* delinquencies of 177 so-called "active" contractors amounted to $295,000 minimally; further *known* delinquencies totalling $534,000 were considered chargeable to 174 so-called "inactive" contractors.

Administrator Majich, summoned as Intervenor's witness, further testified, credibly and without contradiction, that "Short Form" contract signatories regularly constitute a substantial majority of listed delinquents; that such contractors frequently change their business name or the legal form in which they transact business; that many, likewise, change their "official" headquarters or place of business frequently; and that quite a few provide no address information beyond a post office box number through which communications may reach them. The trust funds June 14, 1973, delinquency list for contractors currently "active" within the southern California building and construction industry contains the names of 177 delinquents; of this number, 131 purportedly were "Short Form" contract signers. A concurrently published compilation, with respect to currently "inactive" contractors, lists 174 delinquents; of this number, 135 are coded as committed to "Short Form" contracts. Many firms, on both lists, show P.O. box number addresses, merely. With matters in this posture, so the record shows, the trust funds administrator may, in many cases, experience difficulty with respect to locating delinquent contractors, and with respect to determining the nature, size, and reason for their delinquencies. To assist him in locating

contractors directly responsible for payments withheld, verifying their delinquencies, and maximizing collections, the Administrator maintains a staff of some 15 field representatives, responsible directly to his office. Additionally, he hires auditors, or may engage independent certified public accounting firms, for the purpose of conducting regular, periodic, or random payroll audits; these may cover both reporting and nonreporting contractors with known or newly discovered places of business.

Once a given contractor's delinquency is determined, the trust funds administrator, functioning on behalf of whatever trust or trusts may be concerned, may demand and seek the prompt removal of such a delinquency, through negotiations or legal process. When such procedures produce positive results, leading to a complete settlement of the delinquency by the contractually committed firm directly responsible —either through payment in full or by installment remittances—no further corrective steps need be taken.

When, however, delinquent contractors cannot be located, persuaded, or compelled to proffer their contractually required contribution payments, the trust funds administrator may—pursuant to article I, paragraph B-16 of the master labor agreement herein—seek other contractors, likewise committed to make fund contributions, for whom such delinquent enterprises may have performed services under subcontracts. This search for prime or general contractors, for whom a delinquent firm may have performed subcontract work, may frequently present difficulties. The trust funds have no ready access to data, records, or reports which reveal where particular delinquent contractors may have been performing subcontracts. The administrator may receive relevant information with respect thereto, however, from his field representatives, union business representatives, or workmen—previously employed by delinquent

subcontractors on some prime contractor's construction jobsite—complaining that particular trust fund benefits for which they should be considered qualified have been, without reason, questioned, reduced, or denied. Further, such information may, sometimes, become available through "haphazard, hit-or-miss" discoveries by trust fund auditors when checking the records of contributing employers. Normally, these auditors merely review a contributing employer's payroll records. These records, ordinarily, do not reveal the jobsite location where particular employees may have worked; neither do such records, ordinarily, reveal the names of those prime or general contractors for whom the enterprise being checked may have performed subcontract work. Administrator Majich, within a sworn statement proffered and received for the record, declared that it would be "highly unusual" for trust fund auditors to procure such information, though the particular employer whose records were being checked might voluntarily provide it. Whenever the trust funds discover prime or general contractors for whom known delinquents have performed, or currently are performing, subcontract work, such contractors are notified regarding their possible responsibility for the settlement of their former or current subcontractor's trust fund delinquency. Under normal circumstances, so Administrator Majich testified, discussions then begin—between trust fund representatives, spokesmen for the prime or general contractors, and, possibly, the delinquent subcontractors concerned—looking toward the development of some mutually satisfactory concensus regarding the delinquency's removal. Should the prime or general contractor commit himself to settle his subcontractor's delinquency, completely or partially, he may—consistently with article I, paragraph B-16 of the master labor agreement previously noted—withhold sufficient funds from any moneys due or to become

due his subcontractor, and remit whatever sums may be required directly to the trust funds concerned. All payments proffered with respect to delinquencies, whether made by the contractor directly responsible therefore, or by some guarantor contractor, become part of the "common [fund] pool" which each concerned trust maintains, while notations regarding the working hours covered by such contribution payments are recorded and credited, separately, for the various workmen entitled thereto.

4. The Urban Pacific delinquency

When delinquencies with respect to reports or payments by contractors are first noted, the problems posed with respect to such contractors are reviewed by a bipartite subcommittee of trust fund trustees known as the joint contributions committee. That committee, some time during 1971, directed that the payroll records of Lark Construction Co., Inc., and Urban Pacific Company, a successor—two "Short Form" contract signatory members of the Urban Pacific group—should be checked. The resultant audit disclosed a substantial amount of trust fund contributions due and unpaid. Field representatives of the trust funds administrator could not locate the firms in question, thereafter, working on some active construction project. Their disclosed delinquencies were, thereupon, referred to legal counsel; the firms, however, could not be located for the purpose of serving summons and complaint. Thus, for some time, no specific collection efforts could be made.

The trust funds delinquent employers list for April 20, 1972, contained the name of one firm within the so-called Urban Pacific group, Urban Pacific Construction Co., Inc., which was listed with a Long Beach, California, business address. That firm, designated as privy to trust commitments through a labor contract with Respondent Union purportedly

negotiated and signed by the Underground "Eng. Cnt" Association, wherein the firm purportedly held membership was listed as delinquent because it was allegedly failing to submit trust fund contributions, despite its submission of monthly reports pursuant to which such contributions would have been required. With respect thereto, January 12, 1972, was shown as the date on which the trust funds 10-day delinquency notice had been dispatched. Presumably, the trust funds had listed Urban Pacific Construction Co., Inc., as delinquent within the first list published 10 or more days thereafter. However, delinquency lists containing the corporation's name—prepared and published between January 22 and April 20 specifically—have not been proffered for the present record. General Counsel has submitted limited segments of various delinquency lists prepared and published between April 20 and December 28, 1972, merely. Beginning April 27, the trust funds changed their reporting procedure; they prepared and published two delinquency lists. Within the first, published weekly, delinquent employers considered still "active" within the southern California territory with which we are concerned were listed; with the second, delinquent employers currently considered "inactive" within the southern California building and construction industry, for various reasons, were catalogued. Urban Pacific's name continued to appear, within the trust funds so-called "active" delinquency lists, between April 27 and July 20, 1972. The July 27 compilation, however, contained no Urban Pacific listing; this situation continued until the trust funds October 19th delinquency list was published. Possibly, the firm in question may have been listed on the so-called "inactive" compilation, which the trust funds were then preparing and publishing monthly. Administrator Majich so testified; the record, however, provides no basis for a determination in this regard. Within the

list last designated, Urban Pacific Construction Co., Inc., was again shown as delinquent, this time with a South El Monte, California, address. The firm was, this time, characterized as committed to make trust fund contributions pursuant to a so-called "Short Form" contract with Respondent Union herein; October 9 was designated as the date on which its relevant 10-day delinquency notice had been dispatched, purportedly because of the firm's failure to file required reports. The record contains a stipulation that the various business entities collectively designated as Urban Pacific have been, *at all times material herein*, parties to a so-called "Short Form" contract which embodies the terms of Respondent Union's master labor agreement, including the provisions challenged in this proceeding. This listing remained unchanged through November 30, 1972; between December 15 and December 28, however, the firm was listed as delinquent for several different reasons, with a new November 20, 1972, delinquency notice date.

On various dates during the 9-month period which we have been considering, however, several constituent firms within the Urban Pacific group procured subcontracts—nine in number—calling for the performance of underground pipe and sewer work, connected with southern California construction projects, with respect to which the five contractors previously designated were, separately, functioning as prime or general contractors. Specifically, between May 2 and July 20, Nicks awarded two such subcontracts, while Security accepted a single Urban Pacific proposal. Both Sukut-Coulson and V & L Construction likewise negotiated single subcontracts. Within this decision, reference has been made, previously, to the fact that Nicks and Security were, and remain, AGC member contractors. Sukut-Coulson, which maintains no AGC, BIA, or EGCA membership, has been, throughout the period through which this case is con-

cerned, privy to a separate "Short Form" collective-bargaining contract with Respondent Union pursuant to which various terms and conditions set forth within the master labor agreement, including those challenged herein, have been adopted by reference. V & L Construction and Respondent Union have had no direct contractual relationship. The record warrants a determination, however, that V & L Construction negotiated for Urban Pacific's services in connection with a construction project with respect to which V & L Construction was merely a subcontractor or so-called "voluntary representative" for Zurn Corporation; the latter firm (so counsel have stipulated) held, and currently holds, BIA membership. For present purposes, General Counsel, Respondent Union, and Intervenor agree that Zurn was—throughout the period with which this case is concerned—the real prime contractor with which Urban Pacific held subcontracts. During this period, as previously noted, Urban Pacific Construction Co., Inc., was a listed delinquent contractor. The record is silent with respect to Sukut-Coulson's knowledge in that connection. However, the record warrants a determination, which I make, that weekly trust fund delinquency lists, containing Urban Pacific's name, were then being supplied, regularly, to AGC and BIA, the contractors associations wherein Nicks, Security, and Zurn Corporation held membership.

On August 1, Griffith subcontracted with Urban Pacific for a City of Los Angeles street improvement project; when the subcontract was signed, Griffith's management had, most recently, received the trust funds July 20 delinquency list of so-called "active" contractors; as previously noted, Urban Pacific's name appeared therein. The July 27th list of so-called "active" delinquents—which did not contain Urban Pacific's name—had not yet been received from Griffith's source. The record reveals, without dispute, that

Griffith normally received its delinquency list copies some 6-8 days following their nominal issuance date. I so find. Shortly thereafter, on August 3 specifically—during the period, previously noted, when Urban Pacific's name was not being listed in trust funds delinquency lists of presumptively "active contractors—Zurn/V & L Construction granted a second subcontract to a joint venture comprised of two firms within the Urban Pacific group. Finally (during December, 1972, particularly), Urban Pacific received two more subcontracts, from Zurn/V & L Construction and Sukut-Coulson, respectively; these latter contracts were negotiated, so the record shows, during a period when Urban Pacific Construction Co., Inc., was, once more, being designated a trust fund delinquent.

During January 1973, a trust funds field representative discovered a joint venture composed of two Urban Pacific group members doing subcontract work in connection with a Nicks construction project. Further investigation revealed the joint venture's additional subcontracts with Security, Griffith, Zurn, and Sukut-Coulson; these firms were, thereupon, notified of their responsibility for the payment of Urban Pacific's delinquency. On February 2, 1973, following a conference with the trust fund's administrator, representatives of Nicks, Seecurity, and Sukut-Coulson reached a consensus that each of them, as prime contractors, would promptly pay one-seventh of Urban Pacific's total delinquency, pending a further search for more contractors who might possibly be jointly responsible therefore, and that thereafter each responsible contractor would pay a proportionate share of Urban Pacific's required contributions. Griffith and Zurn, though not represented, were, I find, told of this conference. The record further warrants a determination, which I make, that they were subsequently told of the decisions therein reached.Security and Zurn's represen-

tative, V & L Construction, subsequently paid their committed one-seventh of Urban Pacific's purported $27,000 plus delinquency; they paid approximately $4,000 each. The record, however, warrants a determination, which I make, that these were the sole payments which the trust funds received. Griffith's corporate secretary, summoned as General Counsel's witness, testified that a trust funds representative subsequently requested his firm to pay one-fifth of Urban Pacific's total delinquency, which would have approximated $5,400; presumably, this trust funds demand was made because no more prime contractors, beyond the Five Contractors previously mentioned herein, could be found jointly responsible. The record does not disclose whether the requested payment was made; presumably it was not. Griffith's corporate secretary testified, without contradiction, that, had his firm been considered liable solely for Urban Pacific's current delinquency with respect to its August 1, 1972, Griffith subcontract, something less than $1,000 would have been required to satisfy the firm's contractually mandated derivative or guarantor responsibility for Urban Pacific's contributions. On or about February 12, 1973, therefore, the trust funds administrator notified Verne W. Dahnke, Respondent Union's treasurer and a trustee of three concerned trusts, that, consistently with article I, paragraph B-16(a) of the master labor agreement, the Respondent Union had the "right to withhold services" from "any or all jobs" of the Five Contractors herein.

Some further discussion with legal counsel for these Five Contractors, however, followed. The trust funds records, when reviewed further, revealed, so the parties have stipulated, that various member firms comprising the Urban Pacific group, when the instant dispute arose, merely owed a total $18,386.46 sum in delinquent trust funds contributions. On or about March 7, 8, 9, and 14, 1973, the trust

funds counsel declared, during a series of telephone conversations with counsel for the Five Contractors, that should the latter fail to satisfy Urban Pacific's verified contribution delinquency, the trust funds Administrator would, pursuant to the contractual provision previously mentioned, renew his notice to Respondent Union regarding its right to withhold services from various Five Contractors construction projects.

The record provides no clue with respect to whether the trust funds administrator did really renew his notice. So far as the present transcript shows, no work stoppage took place, thereafter, with respect to Five Contractors' projects. The record does warrant a determination, which I make, that when Sukut-Coulson was told about Urban Pacific's delinquency, that firm hired a number of Urban Pacific's workmen and, thereafter, directly performed the work which Urban Pacific would otherwise have performed pursuant to subcontracts. With respect to comparable steps which Nicks, Security, and Zurn may have taken, however, the record is silent. Urban Pacific's subcontract with Griffith was completely performed several months before Griffith was told that it would be held responsible for a *pro rata* contribution bottomed upon its subcontractor's previously accrued delinquencies. Nevertheless, the present CC and CE charges, with which we are now concerned, were filed on March 8, while counsel for the trust funds and Five Contractors were reviewing the situation and recapitulating their respective positions.

C. *Discussion and Conclusions*

1. The basic issues restated

With matters in this posture, we reach the basic question herein: Whether or not General Counsel has persuasively demonstrated Respondent Union's participation in statuto-

rily proscribed conduct, directly or vicariously, within the meaning of Section 8(e) and 8(b)(4)(ii)(B) of the statute.

As previously noted, General Counsel contends that certain contractual provisions challenged herein possess a forbidden secondary thrust. Further, he seeks a determination that Respondent Union's purported attempt to both effectuate and enforce the provisions in question—through a course of conduct followed, unilaterally, by that body's alleged trust fund surrogates—likewise carried a secondary thrust, violative of law. More particularly, General Counsel contends:

(1) That article I, paragraph B-15 of the master labor agreement—which reflects a commitment that contractors privy thereto "will not subcontract" portions of their jobs to listed delinquent contractors—clearly reveals a statutorily proscribed "cease doing business" objective.

(2) That paragraph B-16, when read in conjunction with Paragraph B-15 (more particularly B-16's first sentence, which purportedly "penalizes" prime or general contractors who may use delinquent subcontractors, by making them "liable" for their delinquent subcontractors' *previously accrued* delinquencies) likewise possesses a forbidden "cease doing business" thrust.

(3) That paragraph B-16's final sentence, which provides that contractually committed firms "shall terminate the contract of the subcontractor who fails to promptly correct his delinquency" whenever such a delinquency arises following the commencement of the subcontractor's work, should, likewise, be considered patently proscribed.

Confronted with General Counsel's contentions, Intervenor's counsel counters, with Respondent Union's concurrence and support, that these challenged contractual provisions should be considered lawful because their primary

purpose cannot properly be considered statutorily forbidden. More particularly, Intervenor's counsel suggests that these contractual provisions merit construction as designed, primarily, to protect and maintain union standards—namely, currently viable health and welfare, pension, and vacation-holiday pay programs negotiated, *inter alia*, for the benefit of those "operating engineer" employees who work for contractually bound contractors.

In this connection, further, Intervenor's counsel, while presenting a statement supportive of his motion to dismiss proffered during the hearing's course, noted a contention that:

> . . . [All] of the employees covered by a single trust have . . . common interests . . . [To] the extent that an employee of one employer is participating in that trust and having part of his wages paid to that trust, he shares an interest with all employees covered by the trust *and has a right to bargain . . . with his own employer*, to cover all aspects relating to [the] integrity and the care and the administration of those trust funds. [Emphasis supplied.]

Counsel suggests, therfore [*sic*], that, regardless of some conceivable "cease doing business" thrust which particular contractual provisions designed to promote such goals may have, their susceptibility to such construction should not be considered sufficient to render those provisions unlawful.

Respondent Union contends, further, that it should not be considered liable for the 8(b)(4)(ii)(B) violations herein charged, because the course of conduct which General Counsel challenges as violative of that statutory provision should properly be found chargeable to trust funds spokesmen or representatives functioning in behalf of various trusts, but not as Respondent Union's surrogates.

The principal legal question thus presented for resolution has recently been considered, within a proceeding wherein General Counsel has challenged the validity of certain comparable "delinquency" provisions, set forth within a southern California master contract between a Teamster's Union joint council and the three contractors associations herein previously designated; *Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Merle Riphagen)*, 212 NLRB No. 5. Administrative Law Judge Penfield's Decision therein presents a comprehensive rationale for his final determination that several challenged provisions within the master contract before him—with respect to the rights, responsibilities and liabilities of contractors who deal or seek to deal with delinquent subcontractor firms—should be considered primary in scope and effect rather than secondary, and, therefore, beyond the statute's postscriptive reach. My review of the relevant legal principles which should be considered determinative herein, set forth below, reflects a partial restatement and paraphrase of Judge Penfield's comparable recapitulation, which I consider definitive; my conclusions regarding (1) the validity of the contractual provisions challenged herein, and (2) the propriety of challenged conduct calculated to effectuate those provisions, derive from that review, plus some further factual and legal determinations bottomed upon the present record.

2. General principles

Historically, Section 8(b)(4), the statute's so-called secondary boycott provision, was designed to limit the scope of industrial disputes. Which due regard for its proscriptive terms, certain described conduct, chargeable to labor organizations or their representatives, could be lawfully directed solely against employers with whom such labor or-

ganizations had primary disputes; their efforts to enmesh "unoffending employers and others" not directly involved with respect to such primary disputes were forbidden. *N.L.R.B. v. Denver Building Trades Council*, 341 U.S. 675, 692. This Board's subsequent decisions, with judicial concurrence, left these secondary boycott provisions, however, somewhat restricted in scope. The Board was considered mandated to proscribe certain union conduct directly leveled against secondary, rather than primary, employers; neutral secondary employers, however, were not considered protected where some contracting union and such a neutral employer had negotiated a contractual provision which required the latter to cease or refrain from doing business with firms which did not maintain certain union standards, or sign certain union contracts. *Local 1976, United Brotherhood of Carpenters and Joiners of America [San Door & Plywood] v. N.L.R.B.*, 357 U.S. 93 (1958). Such so-called "hot cargo" contractual provisions were first proscribed when Congress enacted Section 8(e). This statutory section, in pertinent part, provides that:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the con-

> struction, alteration, painting, or repair of a building, service, or other work. . . .

This statutory language, taken literally, seemingly proscribes all contracts whereby employers agree to "cease doing business" with other persons. This Board, however, currently considers such a literal construction inconsistent with the statute's legislative history; particular contractual provisions have, therefore, been found permissible—despite their conceivable "cease doing business" thrust—whenever they may be considered, essentially, directed toward the realization of primary, rather than secondary, *goals*. See *N.L.R.B. v. Joint Council of Teamsters No. 38* [*Arden Farms Co.*], 338 F.2d 23, 28 (C.A. 9, 1964). The court of appeals therein noted its concurrence with a respondent union's contention that:

> . . . [S]ection 8(e) is not to be applied literally to prohibit all union-employer agreements limiting subcontracting. More particularly, an agreement which restricts subcontracting to protect the job opportunities of the employees of a signatory employer, and not to apply secondary pressure upon third-party employers, may be beyond the purpose of Section 8(e) and excepted from proscription.

Consistently with this view, the Board has frequently held that employers may lawfully agree to refrain completely from contracting out bargaining unit work, since such clauses serve, primarily, to protect work being done by employees of the contracting employer within their bargaining unit, though they (the clauses) would, necessarily, require the contractually committed employers, incidentally or secondarily, to cease dealing with other business enterprises. *Service and Maintenance Employers' Union, Local No. 399, AFL-CIO* (*Superior Souvenir Book Company*), 148 NLRB 1033; *Ohio Valley Carpenters District Council*

United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cardinal Industries Inc.) 136 NLRB 977, 986; *Milk Driver's Union, Local 753, IBT (Pure Milk Association)*, 141 NLRB 1237. However, contract clauses which reflect a clear purpose to blacklist some other specified employers, or classes of employers, because the concerned union considers their labor policies objectionable, will be found unlawful: such clauses are considered primarily calculated to limit or disrupt the signatory employer's business relationships with others, rather than to provide direct benefits and protection for bargaining unit workers. See *District No. 9, IAM v. N.L.R.B.*, 315 F.2d 33, 36-37 (C.A.D.C., 1962); *N.L.R.B. v. Joint Council of Teamsters No. 38, supra* at 28-29, in this connection.

When confronted with specific contract provisions, this Board has, with judicial guidance and concurrence, defined several distinctions which it considers determinative throughout this general field of decisional concern. Within some cases, for example, distinctions have been drawn between so-called "work preservation" and "work acquisition" clauses; within other cases, distinctions have been drawn between so-called "union standards" and "union signatory" provisions. Where a challenged clause can reasonably be considered calculated to protect and preserve available or prospective work for the contractually committed employer's represented employees, or to protect the wages and working conditions of his directly concerned bargaining unit workers by limiting the contractually committed employer's subcontractor privilege to business enterprises which maintain similar standards, such provisions will be considered lawful. *Meat and Highway Drivers Local No. 710 [Wilson & Co.] v. N.L.R.B.*, 335 F.2d 709, 713-716, (C.A.D.C., 1964); *Truck Drivers Local 413, IBT [Brown Transport Corp. and Patton Warehouse, Inc.] v.*

N.L.R.B., 334 F.2d 539, 548 (C.A.D.C., 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO [Calhoun Drywall Co.] v. N.L.R.B.*, 328 F.2d 534, 538-539 (C.A.D.C., 1964); *Highway Truck Drivers and Helpers, Local 107, IBT (S & E McCormick, Inc.)*, 159 NLRB 84, 96-102. Where, however, some contrary determination is found warranted —that a challenged provision is principally purposed to seek or acquire work for bargaining unit workers which employees of other business entities have customarily performed, or that such a provision is calculated to require a contracting employer to do business solely with other union contract signatories—the provision's thrust, *vis-a-vis* the particular contracting employer, will be considered secondary; more specifically, determination will be considered warranted that the contractual clause in question seeks to limit the number of enterprises with whom the contracting employer can do business, or to disrupt currently maintained business relationships. See *N.L.R.B. v. Joint Council of Teamsters No. 38, supra; Meat and Highway Drivers Local No. 710 v. N.L.R.B., supra; Truck Drivers Local 413 v. NLRB, supra*, in this connection.

The relevant decisional principle, relied upon both by this Board and the courts when these distinctions must be drawn, has been defined, most cogently, within *Orange Belt District Council No. 48 v. N.L.R.B., supra;* therein, the Court of Appeals for the District of Columbia declared:

> The test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as whether it will "directly benefit employees covered thereby," and "seeks to protect the wages and job opportunities of the employees covered by the contract." We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and

> seek "to protect and preserve the work and standards [the union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."

The challenged provisions of the master labor agreement herein—likewise compassed, solely by reference, within Respondent Union's numerous "Short Form" contracts—must, therefore, be reviewed, with due regard for the foregoing decisional principles, to determine their primary or secondary character.

3. The "principal work units" herein

When required to determine whether particular subcontractor clauses may properly be considered "germane to the economic integrity of the principal work unit" this Board has, within a concededly unique factual context, found the so-called "work unit" concept synonymous with its well-defined, statutorily mandated "bargaining unit" conception.

Note particularly, with respect to this matter, those Board and court cases wherein the so-called "Protective Wage Clause" and "80-Cent" provision found in various United Mine Workers contracts have been considered. *Raymond O. Lewis, et al. (Arthur J. Galligan)*, 144 NLRB 228 (1963) 148 NLRB 249 (1964), remanded for further consideration 350 F.2d 801 (C.A.D.C., 1965); *International Union, United Mine Workers of America (Dixie Mining Company)*, 165 NLRB 467 (1967), remanded for further consideration 399 F.2d 977 (C.A.D.C., 1968); *W. A. Boyle, et al. (Arthur J. Galligan and Dixie Mining Company)*, 179 NLRB 479 (1969), reversing 144 NLRB 228 on reconsideration, and dismissing complaint; *International Union, United Mine Workers of America, (Dixie Mining Company)*, 188 NLRB 753 (1971), reversing 165 NLRB 467 on reconsideration

and dismissing complaint; *International Union, United Mine Workers of America v. N.L.R.B.*, 468 F.2d 1139 (C.A.D.C., 1972), dismissing a petition for review with respect to 179 NLRB 479, for lack of a justiciable case or controversy, and dismissing review proceedings, which the court had previously initiated *sua sponte* with respect to 188 NLRB 753, for want of jurisdiction. During this protracted litigation (see 165 NLRB 467, at 468 particularly) the Board declared, consistently with certain intervening court of appeals decisions, that:

> . . . [W]e conclude that the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes, and that such units in the present case are the single employer and multiemployer association units for which separate negotiations are conducted. . . .

The Board was then considering the so-called "80-Cent" provision within the most recent United Mine Workers contract, finding that it constituted a statutorily proscribed "union signatory" clause.

Should the Board's preliminary determination within such a context, regarding the "principal work unit" question, be considered determinative, nevertheless, with respect to the comparable question which this case presents? Concededly, nothing within the specific master labor agreement provisions with which we are now concerned purports to proscribe, control, or define permissible business relationships between a contractually committed employer and possible subcontractors who may not be contract signatories; article I, paragraphs B-15 and B-16, rather, set forth certain contractual rights, responsibilities, liabilities, and privileges

with respect to contract signatory firms dealing with other contract signatories, solely.

Within their respective briefs, General Counsel's representative and Intervenor's counsel have proffered somewhat divergent views regarding the relevance, herein, of the Board's current "principal work unit" definition, noted. Their respective positions, however, can hardly be considered crystal clear.

General Counsel's brief suggests, preliminarily, that the Board's *United Mine Workers* language, herein quoted, should be considered broad enough to provide a definitive frame of reference within which a required determination can be made regarding the primary or secondary nature of the clauses which he challenges. Subsequently, however, General Counsel's representative, still within his brief, seemingly proffers a different contention:

> Thus, it is submitted, the unit should be limited to employees of *a* signatory employer. Under the above-cited cases, the principal work unit must correspond to an appropriate unit under Section 9 of the Act; *i.e.*, *the employees of one of the Five Contractors* or other signatory employers; by enforcing the clauses against *several signatories* to the Master Labor Agreement . . . Respondent is protecting union members generally, and such is clearly secondary activity. . . . [Emphasis supplied]

Taken at face value, General Counsel's last submission, quoted, seems to suggest a contention that "work units" within the southern California building and construction industry should be considered limited to the employees of single contractually committed employers, even though such employers may be contractually bound solely by virtue of their membership in contractors associations signatory to master contracts.

Contrariwise, within their respective briefs, Respondent Union and Intervenor have suggested, initially, that, with particular reference to trust fund matters, the so-called "principal work unit" herein should be construed to compass, within a single industrywide, areawide group, the workmen employed by all employers, within the 11-county southern California territory which the master labor agreement covers, contractually committed to make trust fund contributions, without regard to whether such employers are contractually bound by virtue of their association membership or through separately signed "Short Form" contracts. Subsequently, however, intervenor's counsel seemingly suggests, within his separate brief, that, since we are dealing herein with contractual provisions clearly designed to protect and maintain "union standards" without "union signatory" overtones, no determination need presently be made with respect to whether such provisions cover "operating engineer" employees within a single industrywide, areawide contract unit, or whether they cover such employees within a congeries of multiemployer and single employer bargaining units. See, in this connection, *W. A. Boyle, et al.* (*Arthur J. Galligan and Dixie Mining Company*), *supra* at 480, particularly Member Jenkins' concurrence. Intervenor's counsel would, naturally, have this Board conclude that article I, paragraphs B-15 and B-16 of the master labor agreement constitute permissible "union standards" provisions, designed to protect and preserve the "economic integrity" of those fringe benefit programs with respect to which Respondent Union, AGC, BIA, and EGCA have bargained. The trust funds, however, seem to suggest, within their brief, that such a determination can be made, upon this record, regardless of whether the provisions in question are construed to cover employees separately represented within closely related multiemployer and single

employer bargaining units, or whether the concerned contractor employers are considered a single "work unit" with respect to trust fund matters.

With due regard for this Board's prior decisional announcements, however, I conclude that multiple bargaining units, defined in conformity with well-established principles which the statute mandates—rather than a single southern California industrywide unit coterminous with trust funds coverage—constitute the several "principal work units" with respect to which Respondent Union may properly negotiate to preserve and protect fringe benefit programs and work standards. Throughout the *United Mine Workers* litigation previously noted, the Board has consistently so determined. Note, in this connection, *Raymond O. Lewis, et al.* (*Arthur J. Galligan*), 148 NLRB 249, 253-254; *International Union, United Mine Workers of America* (*Dixie Mining Company*) 165 NLRB 467, 475-476; *W. A. Boyle, et al.* (*Arthur J. Galligan and Dixie Mining Company*), *supra* at 483-484; *International Union, United Mine Workers of America* (*Dixie Mining Company*), 188 NLRB 753. Within these decisions, the Board held initially that certain challenged contract provisions which it first characterized as so-called "union signatory" clauses carried a secondary thrust which Section 8(e) proscribes, when generally applied within a multiplicity of bargaining units rather than a single industrywide unit. Later, following two judicially decreed remands, the Board concluded that both of these selfsame contract provisions should be considered permissible "union standards" clauses; nevertheless, it reaffirmed its prior determination that the contractually defined congeries of bargaining units, for which the disputed clauses had been separately negotiated, provided the context within which their 8(e) validity would have to be demonstrated. True, the master labor agreement provisions challenged herein clearly

purport to protect and maintain current fringe benefit standards solely; the present record, considered in totality, clearly dictates a conclusion that they are purposed to preserve the financial stability and functional capability of contractually mandated employee benefit programs. This Board's currently viable decisional doctrines, however, clearly require a determination that the so-called "work units" within which Respondent Union and concerned contractors may negotiate such work standards protection cannot be wider than their several "bargaining units" separately considered.

Some cogent arguments, conceivably, can be made that equating "work" and "bargaining" units for 8(e) purposes would, under some circumstances, be unrealistic. For example: The record, herein, reveals that Respondent Union's master labor agreement, negotiated with AGC, BIA, and EGCA jointly, and thereafter renegotiated with various "Short Form" contract signatories separately, does establish genuinely uniform work terms and conditions of employment for the workmen employed by contractors privy thereto. Respondent Union really has negotiated a consensus which, in effect, provides for uniform industrywide, areawide conditions, despite its embodiment within numerous documents, nominally negotiated "unit by unit" and separately signed. Further, record testimony herein warrants a determination, which I make, that, when the concerned contractors associations and Respondent Union negotiated the particular master labor agreement provisions which we are presently considering, they were looking beyond the strict confines of their own multiemployer AGC, BIA, EGCA bargaining unit. Both Respondent Union's negotiators and their counterparts within the contractor's group were clearly mindful of their mutually felt need to deal with the wider problem of trust fund contribution delinquencies. Certainly, some reasonable arguments can be proffered,

then, that when these negotiators last met to revise their master contract they were, particularly in this connection, bargaining for so-called "delinquency" provisions which would, eventually, cover all contractually committed firms, both those bound by virtue of their association membership, and likewise those who would later signify their concurrence by signing "Short Form" separate contracts.

However, this Board's current decisional doctrine—see *Raymond O. Lewis et al.* (*Arthur J. Galligan*), 148 NLRB 249, 253-254, particularly—presently forecloses a determination, herein, that, with respect to trust fund matters, the various contractors associations and single contractors signatory to separate contracts have manifested some common purpose to create or recognize a single multiemployer bargaining unit within their 11-county southern California territory. Any such contention, proffered in Respondent Union's behalf, must, for the present at least, be rejected.

4. The purpose of the challenged clauses

a. *General Counsel's position*

With this determination that Respondent Union's master contract provisions herein really cover multiple bargaining units, which must be considered separable, within the southern California building and construction trade, we confront General Counsel's contention that article I, paragraphs B-15 and B-16, compassed within cognate contracts for these separable bargaining entities, possess a secondary thrust.

Substantially, General Counsel suggests that these provisions cannot reasonable be considered purposed to protect contractually mandated working conditions for covered employees within some single "bargaining unit" merely; more particularly, they cannot be considered "addressed to the labor relations of the contracting employer vis-a-vis his own

employees'' despite their presence within a contract which defines their wages, hours, and conditions of work. See *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 645 (1967). Rather, General Counsel contends, the challenged clauses within each of the numerous contracts must be considered ''aimed really at the union's difference with another employer'' (*Local No. 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO [Detroit Edison Co.] v. N.L.R.B.*, 278 F.2d 858, 864 (C.A.D.C., 1960)), since they provide methods whereby pressure may be brought, when required, upon the latter, with whom Respondent Union may have a primary dispute.

With these propositions constituting his major premise, General Counsel characterizes Respondent Union's presumptive concern with Urban Pacific's delinquent trust fund contributions as the so-called ''primary'' dispute herein. Within his brief, then, he proceeds as follows:

> The [challenged] clauses specifically hold a [prime] contractor responsible for the delinquencies of a subcontractor, thereby discouraging the doing of business with the subcontractor . . . [The] language provides that the contractor may limit his liability under the agreement by terminating the subcontract. The subsections permit Respondent [Union], although engaged in a primary dispute over unpaid fringe benefits with a signatory subcontractor, to enmesh a neutral general contractor in the dispute, shift all liability to the latter, and, in effect, make it the guarantor of the subcontractor's obligations.

Thus, General Counsel notes, the contractual provisions now in question have enmeshed Five Contractors, characterized as neutral contractors herein; they have been treated as guarantors for Urban Pacific's trust fund liability.

Respondent Union, so General Counsel contends, would have them penalized, thus, for having done business with Urban Pacific, despite their receipt of notice regarding that business entity's contribution delinquency. With these propositions for predicate, General Counsel suggests that the challenged contractual clauses have a secondary, statutorily proscribed purpose and thrust.

b. *Discussion*

When proffered in these categorical terms, however, General Counsel's contentions within my view beg the basic question presented herein. In connection therewith, General Counsel has provided no persuasive rationale for his declaration that, regardless of circumstances, prime contractors, privy to Respondent Union's master contract, should be considered "neutral" parties with relation to controversies bottomed upon trust fund contribution delinquencies chargeable to their subcontractors. In regard to controversies premised upon such delinquencies, I am persuaded that prime contractors—whether privy to Respondent Union's master labor agreement by virtue of their contractors association membership or their "Short Form" contract signatory status—cannot reasonably be thus regarded.

The provisions challenged herein, concededly, govern a definable, limited category of business relationships; they cover situations wherein prime contractors privy to Respondent Union's master labor agreement have dealt, or propose to deal, with other signatory contractors, solely. With respect to situations described thus generally, however, several distinguishable variations remain conceivable. These include:

1. Cases in which prime contractors, privy to Respondent Union's master contract through their contractors as-

sociation membership, subcontract with other AGC, BIA, or EGCA members.

2. Cases wherein contractors association members subcontract with business enterprises singly privy to Respondent Union's master labor agreement by virtue of their concurrent "Short Form" contracts, separately signed.

3. Cases in which prime contractors privy to separately signed "Short Form" labor agreements hold subcontracts with contractors association members.

4. Cases wherein "Short Form" contract signatories negotiate subcontracts with other business enterprises singly bound, likewise, through labor contracts with Respondent Union separately signed.

Regarding situations which would fall within the first category described, General Counsel herein presumably takes no discernable [*sic*] position; though he calls article I, paragraphs B-15 and B-16 generally "secondary in thrust" within his brief, their conceivable applicability with respect to business relationships between prime contractors and subcontractors jointly bound thereby, through privity within a single "multiemployer" bargaining group, has not herein been considered. The possibility that prime contractor-subcontractor relationships may be negotiated between business enterprises so situated cannot be gainsaid; the present record, however, reflects no such situation. General Counsel does, however, press his contention with respect to situations compassed within the second and fourth categories. I note, in this connection, that Griffith, Nicks, Security, and Zurn/V & L Construction have all been, throughout the period with which this case is concerned, contractually committed with respect to Respondent Union's master labor agreement by virtue of their contractors association membership; Urban Pacific's subcontracts with

these business enterprises, therefore, presumably fall within the second category. Sukut-Coulson's contractual commitment derives from its separately signed "Short Form" contract; this prime contractor's several subcontracts, therefore, would seem to fall within the category last noted, since Urban Pacific's various business entities have been, likewise, separate contract signatories. These particular prime contractor-subcontractor situations, then, provide the factual context with respect to which relevant determinations herein must be made.

Respondent Union's master contract, with respect to which these designated business enterprises are, jointly or severally, committed, purports to set standards governing wages, hours, and working conditions for "operating engineers" hired by signatory contractors throughout a defined southern California territory. The AGC, BIA, and EGCA contractor members privy thereto, together with numerous "Short Form" contract signatories, comprise a multifarious group of business enterprises which, separately or conjointly, provide needed services within the building and construction trade. The various business enterprises noted have all been, throughout, bound equally to pay contract wages, and to provide funds for various contractually specified fringe benefits through required trust fund contributions. Respondent Union's contract—within articles VIII, IX, X, and XI particularly—commits the contractors bound thereby "to abide by" the various agreements and declarations of trust previously noted, and to make monthly contributions of certain fixed sums "per straight time or overtime hours worked" by their workmen contractually covered. Counsel have stipulated, herein, that, throughout the period with which this case is concerned, the various prime contractors with whom we are concerned, Griffith, Nicks, Se-

curity, Zurn, and Sukut-Coulson, have had on their respective worker payrolls one or more members of Respondent Union, subject to their current collective-bargaining contract's terms. With matters in this posture, determination seems clearly warranted that these contractors—though their several commitments with respect to Trust Fund contributions may be set forth within discrete documents—necessarily share parallel concerns regarding their trust funds' financial integrity and functional capacity to provide, for their workmen, the contractually mandated fringe benefits noted. Intervenor's witnesses have, substantially, so testified; I so find.

I note, further, that many building and construction industry workmen, characteristically, find repeated short-term employment with numerous "area" contractors throughout their respective work histories, since divers construction projects within a given territory are constantly being commenced and concluded, contractors are constantly transferring their business operations from one completed project site to another where new construction will be required, and construction crew complements must consequently be changed, augmented, or reduced frequently, consistent with work requirements.

This being found, the creation of multiple trust funds with broadly defined industrywide, areawide jurisdiction, for the purpose of collecting contributions and disbursing contractually mandated fringe benefits, clearly provides a practical method whereby covered employees with largely transient employment histories may be qualified for fringe benefits earned, regardless of the number of contractors for whom they may have worked. Such qualified employees will receive the same fringe benefits which the trust funds disburse, regardless of whether they have worked for one or more contractors, and, likewise, without regard to whether their

particular contractor employers may have been privy to Respondent Union's master labor agreement by virtue of some contractors association membership or by virtue of their status as separate "Short Form" contract signatories. Thus, the employees in question, like their contractor employers, share a common concern for the continued solvency, sufficency, and viability of those trust funds from which their health and welfare, pension, and vacation-holiday pay benefits derive. The record, within my view, warrants such a conclusion, and I so find.

Concurrently with their manifest determination to provide fringe benefits through trust funds specially created for which their "operating engineer" employees might qualify, the various employers concerned, whether bound to provide such benefits through a multiemployer contract or separately signed documents, have clearly committed themselves to programs and procedures designed to make sure that their trust funds remain adequately funded, with the capacity to protect and preserve their continuing solvency, and thereby to maintain their contractually mandated programs. The financial integrity and functional capability of these funds, currently and hereafter, clearly depends, in significant measure, upon required contributions neither being evaded nor falling in arrears; delinquencies, should they be permitted to become long-continued or widespread, could adversely affect every employee working for contractors within the territory which the master labor agreement covers. These "adverse effects" could touch every covered workman with a current or prospective fringe benefit claim, regardless of whether his claim had been, or would be, derived from work "credits" earned with some contractors association member, some "Short Form" signatory, or numerous contractors in both categories.

The hazard noted must be considered more than theoretical. Intervenor's detailed testimonial presentation herein, with respect to various trust fund operations past, present, and future, fully warrants a determination that sustained, unremedied delinquencies could seriously compromise their capacity to provide negotiated fringe benefits for all contractually covered employees.

1. With respect to health and welfare fund operations particularly, the testimonial and documentary record will support a determination, which I make, that reduced collections can significantly hamper the trust's ability to provide a defined schedule of benefits, since the trust's reserves could be adversely affected. Within the recent past, developing financial stringencies have, in fact, forced the fund's trustees to borrow $2 million, change carriers, and drastically modify benefit plans; they have dictated the termination of some substantial medical benefits, and cost-cutting modifications with respect to plan administration and claim processing procedures. The fund's difficulties were, so credible testimony shows, partially caused, and certainly aggravated, by delinquent contractors whose contribution payments, required pursuant to collective-bargaining contracts, were not received. With a stepped-up payroll audit program and more strenuous collection efforts, the fund's benefits have been, most recently, improved.

2. The Operating Engineers pension trust program—which provides both normal, early and disability retirement pensions for covered workmen and death benefits for their beneficiaries—must necessarily rest upon funds actually received and held for investment, plus whatever earned interest may be derived therefrom. Thus, the trust's proclaimed uniform plan, with respect to retirement and death benefits claimable by qualified employees with all signatory employers, has been, and will be, directly affected, and

conceivably diminished, through contribution delinquencies chargeable to particular signatory contractors. Witness Administrator Majich noted that collection failures "seriously affect" this trust fund's interest earnings. In this connection, further, Harley Blankenship, vice president of a firm of independent actuarial consultants which the trust funds retains, testified, without challenge or contradiction, that, with full collections and no delinquency problems, the trust could support measurably "improved" retirement and death benefit programs for all qualified workmen.

3. The vacation-holiday savings trust, like its companion funds, deposits contributions received within a single interest-bearing "common pool" bank account, while the specific *sums* contributed for particular workmen are reported and credited within their personal records. Further, hours which particular employees may have worked, for which contributions have not been received, when proven to the trust's satisfaction, are recorded as so-called "unpaid hours" likewise within their personal records. The sums which have been received by this designated trust are distributed semiyearly to various workmen for whom such contributions have been proffered. Employees who may have worked "unpaid hours" do not, however, receive vacation or holiday pay, computed with respect thereto, concurrently with the trust's regular semiyearly distribution. Shortly thereafter, the workmen credited with such "unpaid hours" may apply for the payment of benefits based thereon. When provided with reasonable proof regarding their hours of work for which contributions were not paid, the fund's board of trustees will make "vacation-holiday" payments to the concerned workman, using funds which are derived from the interest earned during the previous 6 months on contributions paid by other contractors. Benefit payments covering "unpaid hours" will be made, normally, solely

to the extent that such interest earnings have become available; the trust's administrative costs must, likewise, be paid from such interest earnings. Whenever a balance thereof remains undistributed, the trust distributes such left over interest income to covered workmen in the form of supplementary semiyearly dividends. Recently, for several years, largely because a substantial number of proven "unpaid hours" have had to be funded, the vacation-holiday savings trust has been unable to distribute such supplementary dividends; payments were, however, resumed in December 1972 and May 1973, bottomed upon recent surpluses. The fund's experience has demonstrated, therefore, that when the payment of benefits bottomed upon proven "unpaid hours" diminishes the total sum available within its interest earnings account, the remainder available for dividend payments to all qualified trust participants is correspondingly reduced.

4. The southern California Operating Engineers apprentice training trust funds and maintains a training program for apprentices within the operating engineers craft. Administrator Majich's credible testimony, proffered without challenge or contradiction in this connection, warrants a determination, which I make, that, while such program expenditures in previous years have been kept within available fund limits, this trust has recently begun to experience current monthly deficits, largely because of heightened Federal and state educational requirements with respect to apprentice training. The fund's board of trustees currently believes that its currently required level of training activity cannot be sustained with the fund's present $.02 contribution rate. Witness Administrator Majich declared that higher contributions, contractually specified, would provide "one obvious solution" with respect to the fund's current deficit situation. Such a higher contribution rate for apprentice

training purposes, however, would significantly affect the total "economic package" with respect to which Respondent Union and the various concerned contractors associations would be negotiating. The higher rate could, conceivably, dictate a commensurate increase with respect to the total package negotiated; of course, such a consequence would, *pro tanto*, raise every concerned contractor's business costs. Alternatively, such a contribution rate increase for apprentice training—within a total "economic package" negotiated with no coequal change—could claim a proportionately greater share thereof; this would necessarily, reduce the sums left available for higher direct wage payments, or further fringe benefits for concerned workmen.

With matters in this posture, there can be no doubt that the financial integrity and functional capability of these various trust funds does, to a significant degree, depend upon required contributions neither falling arrears nor being circumvented. Within his brief, Intervenor's counsel suggests, in this connection, that "the degree of effectiveness in collecting required contributions from delinquent contractors has a direct economic impact on the amount of 'common pool' funds available" for thses various fringe benefit programs. That suggestion, within in [*sic*] my view, reflects a truism. Necessarily, therefore, widespread or long-sustained delinquencies, should they be permitted, or left standing without remedy, could, as previously noted, adversely affect every contractor's employee presumptively qualified to claim these contractually defined fringe benefits. Such workmen, whether qualified because of their work histories with contractors association members, with separate "Short Form" contract signatories, or with both at various times, would be equally disadvantaged.

Metaphorically speaking, these trust funds provide a fringe benefit "umbrella" which covers qualified workmen

in *many* bargaining units. Whenever that umbrella's protection canopy is damaged, breached, or constricted, *all* workmen nominally eligible for protection thereunder are *pro tanto* deprived of that protection—whether they earned their rights to claim it under contractual provisions within a master contract or short form document.

Of course, the primary responsibility to provide required trust fund contributions rests with those business enterprises which directly employ particular covered workmen. When such business enterprises satisfy their contractual obligations completely—whether they do so routinely, or following their receipt of notice regarding a claimed delinquency—nothing further can be required. The contractual provisions challenged herein, however, reasonably recognize that there may be contractors, most likely those with less working capital and less productive capacity, who may not be willing or ready to discharge their primary responsibilities in this connection. Article I, paragraphs B-15 and B-16 provide that, when this occurs, neither the delinquent contractor's employees nor those employed by other non-delinquent contractors will suffer, because the prime contractor can be required to guarantee the removal of accrued delinquencies, and the continuation of contribution payments, whenever he has used, or continues to use, a delinquent subcontractor's services. Less than 5 years ago, this Board noted concurrence with a Trial Examiner's decision that labor organizations could, *without violating the statute*, press a bargaining demand that contractors with whom they were negotiating should participate in, and contribute to, trust funds which had been created to service craft workers in several bargaining units beyond the particular circumscribed unit which their negotiations concerned. *United Slate, Tile & Composition Roofers, Local No. 220 (Roofing Contractors Association of Southern California, Inc.)*, 177

NLRB 632, 649-652. To hold now that employers privy to such a broad commitment cannot, legitimately, negotiate a further compact between themselves and with the labor organization which represents their workmen designed to preserve and protect their common trust fund's capacity to service its multiunit beneficial constituency, would be, within my view, highly anomalous. However, General Counsel suggests that prime contractors should be considered neutral "secondary" firms, under these circumstances, since, when they are called upon to fulfill "guarantor" commitments, the benefits flowing from their payment of some other firm's accrued delinquencies do not go to their own employees. "If [the payment] benefits anyone, it benefits the employees of the delinquent subcontractor." This contention, however, derives from a misconception. The record shows clearly that all contributions received by these trust funds are deposited in "common pool" accounts. Employees whose work histories include some service with delinquent subcontractors may nevertheless qualify for benefits from a particular fund's "common pool" by providing their entitlement to sufficient hourly work credits with contractors committed to make contributions—through their personal check stub records, monthly reports which their delinquent employer or different contributing employers may have submitted, or payroll audits which trust fund representatives may have made—whether or not contributions related thereto have been remitted. Thus, such contributions, when belatedly paid, whether by their own employer or some other firm which has retained their employer through a subcontract, merely benefit such employees to the same degree, and in the same way, that all other covered workmen are benefited by promoting the solvency and functional soundness of the funds.

Under these circumstances I conclude, despite General Counsel's contrary contention, that all "operating engineer" employees whose wages, hours, and conditions of work are governed by Respondent Union's master contract—whether they work for prime contractors within a multiemployer bargaining unit or for separate "Short Form" contract signatories—share a direct economic interest regarding the timeliness and completeness of those trust fund contributions with respect to which their contractor employers have been committed. Further, I conclude that article I, paragraphs B-15 and B-16 were specifically designed to protect and preserve these direct economic interests, within each separate "bargaining unit" with which we are concerned. General Counsel's contrary contention, within the context with which we are now concerned, would create, if found persuasive, some highly anomalous situations. AGC, BIA, and EGCA members *who subcontract with other members of their jointly bound trade associations* could be held "guarantors" for their subcontractor's trust fund contributions. But such contractors association members who subcontract with (a) members of some other trade associations privy to separately negotiated contracts with Respondent Union herein, or (b) "Short Form" contract signers, could not be considered bound by the contractual provisions now in question. Confronted with such a legal situation, prime contractors holding AGC, BIA, or EGCA membership could conceivably be *encouraged* to subcontract with delinquent firms, privy to "Short Form" contracts or separately negotiated multiemployer contracts, thus endangering the "economic integrity" of the several trust funds which service some of their own employees. This Board, within my view, cannot reasonably conclude that Congress, when it settled Section 8(e)'s present language, proposed to legislate this kind of double standard, with

respect to "hot cargo" clauses, within the building and construction trades. These disputed clauses "directly benefit" the workmen employed by contractors bound thereby. They protect the fringe benefits of such workmen, within each separately covered bargaining unit; they may, therefore, reasonably be considered "germane to the economic integrity" sought for those fringe benefit programs for which employees within these "work units" may qualify. Within his brief Intervenor's counsel notes, cogently, that:

> When Intervenors are successful or fail in the collection of payments owed by a delinquent employer, all covered employees are benefited or are damaged uniformly, regardless of whether they work for the particular employer and certainly without regard to whether they are employed by a member of an employer association or a "short form" contractor . . . Any loss of payments owed to the trusts by employers may rightly be of substantial concern and primary interest to employees and employers who are engaging in collective bargaining regarding the necessity, amount and collection of such payments to the trust. When Intervenors expend funds for the collection of delinquent amounts, or are ultimately unsuccessful in collecting delinquent contributions, the effect on each and every employee of the bargaining employer is an immediate and material drain upon the amounts paid to the trusts by reason of hours worked by each such employee.

Clearly, contractual provisions designed to forestall, remedy, or meliorate such a direct, tangible economic consequence, as previously noted, promote a legitimate "bargaining interest" which all covered "operating engineer" workmen, whether employed by prime contractors or subcontractors, share. Such provisions, within my view, deserve recognition and validation, like those contractual

"work preservation" and putative "union standards" clauses which this Board has previously found privileged.

Realistically, the challenged delinquency provisions herein do function as permissible "union standards" clauses. They provide a currently viable method whereby contractually mandated fringe benefit programs may be protected and preserved, since: (1) They facilitate the termination of subcontracts with signatory contractors whose previously accrued or newly generated contribution delinquencies could prejudice the maintenance of such programs; and (2) they remove whatever economic motivation a prime contractor may have to negotiate or maintain subcontracts with delinquent employers, premised upon lower bids proffered by such delinquents, which have been facilitated by their failure or refusal to bear contractually mandated fringe benefit costs. Within his brief, Intervenor's counsel notes persuasively, with record support, that:

> . . . [It] must be recognized that the disputed clauses function as an important protection of the union standards and unit work of the employees of the general contractor. If the general contractors were allowed to utilize subcontractors who do not pay fringe benefits, obviously the subcontractor could bid the same work much more cheaply than the general contractor could do the work with his own operating engineer employees. Under such circumstances the general contractor would be highly motivated to subcontract all operating engineer's work, to the detriment of his own operating engineers employees. In order to deter such conduct, the disputed clauses impose upon the general contractor all pre-existing delinquencies of a delinquent subcontractor. Without such a deterrent as liability for the added delinquencies, the unscrupulous general contractor would be encouraged to gamble with the use of delinquent subcontractors. . . .

General Counsel suggests, however, that prime contractors are "penalized" when they are required to cover *previously accrued delinquencies* for newly retained subcontractors. I find the suggestion unpersuasive, for several reasons.

First: Respondent Union's master contract, with respect to which both the prime contractor and delinquent subcontractor are consensually committed, reflects their mutual agreement that prime contractors who make good their subcontractor's previously accrued delinquencies "shall withhold sufficient funds from monies due or to become due such subcontractor" for work previously performed or work in progress, satisfying their derivative funds liability therefrom. This provision, substantially, reflects a general recognition, necessarily shared by all contractors privy thereto, that prime contractors, when called upon to make trust fund contributions for their subcontractors, may recoup payments made. *Secondly*: Those contributions which a prime contractor may be required to provide can never exceed his chosen subcontractor's total trust funds liability, or some *pro rata* share thereof. Thus, they can never be greater than the total cost burden, chargeable for fringe benefit programs specifically, which the subcontractor has failed or refused to satisfy. Such contribution payments, therefore, will necessarily "bear a reasonable relationship" to those differentials in business costs, between contributing and noncontributing contractors, which enable the latter to underbid the former, competitively, when both are seeking subcontracts. See *International Union, United Mine Workers of America*, 188 NLRB 753, in this connection. When one or more prime contractors are held liable for trust fund payments, their contributions, roughly speaking, merely "equalize the differences in [fringe benefit program] costs" between their chosen noncontributing subcontractor and the contributing firm with which they could have subcontracted.

Within this Board's most recent *United Mine Workers* decision just noted—wherein a determination was made that the labor organization's contractual "80-Cent" provision constitutes a so-called "union standards" clause, for reasons comparable with those herein discussed—the decisional rationale whereby such clauses have been sustained was summarized. The Board, therein, declared that:

> The validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs. By removal of the economic incentive, a union standards clause protects and preserves unit work precisely to the extent that the economic incentive to subcontracting is the compelling consideration. Under any union standards clause, the signatory employer is not restrained from subcontracting work to employers in another bargaining unit covered by similar wage contractual provisions. Such subcontracts may of course be made for other than economic reasons; however, the fact that such subcontracting is permitted does not detract from the fact that the object of such clause is to preserve and protect unit work. This was as true of the [Protective Wage Clause] as it is of the 80-cent clause. Accordingly, we find that the existence of a multiplicity of bargaining units does not preclude the 80-cent clause from functioning as a union standards clause as it was intended to do.

Parallel reasoning, within my view, dictates validation with respect to the challenged "delinquency" provisions herein. These provisions, likewise, remove a prime contractor's economic motivation to subcontract his unit work with other contractors, whether within his bargaining unit or separately committed, who, despite their parallel commitment to main-

tain regular trust fund contribution payments, have defaulted with respect to that commitment and thereby have made possible their performance of such work with "cheaper" labor costs. By removing the prime contractor's economic motivation, the provisions challenged herein serve two primary purposes. *First*: They protect and preserve work—either for the prime contractor's employees or for employees of some contributing contractor seeking a subcontract—precisely to the extent that the prime contractor's economic motivation for subcontracting may have been his compelling consideration. *Secondly*: They protect and preserve the financial integrity and functional capability of fringe benefit programs contractually mandated for the prime contractor's employees, which programs could, conceivably, be prejudiced should such prime contractors find themselves free to subcontract with delinquent firms without restriction. The contractors governed by these consensual limitations have not been restrained from subcontracting work with business entities within some separate bargaining unit, which are, likewise, committed to make trust fund contributions, and reciprocally committed to forswear dealing with delinquent contributors or make good their delinquencies, should such business entities become prime contractors. Rather, signatory contractors, pursuant to these clauses, have accepted contractual restraints and contingent liabilities, which concededly define and/or limit their subcontract rights, primarily to protect and preserve negotiated fringe benefit programs for their respective "bargaining unit" workmen. Since the provisions challenged herein serve the primary purpose noted, within each separate "bargaining unit" with respect to which their applicability has been stipulated, they must be considered permissible "union standards" clauses; I so find.

Whatever secondary consequences compliance with such provisions might generate when a prime contractor proceeding consistently therewith ceases doing business with a delinquent subcontractor should be considered, within my view, purely incidental; such secondary results cannot, reasonably, be considered sufficiently significant to detract from the provisions' lawful primary purpose.

5. Purported secondary boycott threats

General Counsel's charge herein, with respect to Respondent Union's purported 8(b)(4)(ii)(B) violation, derives entirely from Respondent Union's supposed effort coercively to implement the contractual provisions which have, herein, been considered. Since I have, however, found that these provisions serve a statutorily permissible primary purpose, conduct consistent therewith—purportedly chargeable to Respondent Union herein—would necessarily have a primary rather than secondary thrust. Such conduct would, therefore, merit characterization as lawful. With the provisions challenged herein found primary, and with conduct consistent therewith found lawful, no further consideration need be given Respondent Union's secondary claim that it should not, in any event, be held responsible for particular conduct directly chargeable to Trust Funds Administrator Majich and counsel, undertaken purportedly in Respondent Union's behalf. Should the Board, however, disagree with my basic determination herein, some "side" comments regarding the question of the trust funds' putative agency status—particularly within the specific context with which this case is concerned—may be warranted. General Counsel contends that the four trust funds with which we are concerned—or, rather, their several boards of trustees considered as a group—function generally as surrogates for the parties designating them, who likewise control their con-

tinued tenure. See *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al. (Turner-Brooks, Inc)*, 161 NLRB 229, 233-234; *Local 138, International Union of Operating Engineers, AFL-CIO (J. J. Hagerty, Inc.)*, 139 NLRB 633, 637, enfd. 321 F.2d 130, 137 (C.A. 2, 1963); cf. *Local 140, Bedding, Curtain & Drapery Workers Union (The Englander Company, Inc.)*, 109 NLRB 326, 329; *Raymond O. Lewis, et al.*, 144 NLRB 228, 232. However, such a conclusion—particularly with reference to the situation with which we are presently concerned—might well be considered unreasonably simplistic. When reviewing the status of bipartite boards of trustees, this Board has several times held that their trustee members, whether designated by concerned employers or labor organizations privy to some trust fund's formation, function as statutory "agents" with respect to both principals. In this case, however, we are dealing, realistically, with agents of the Southern California Benefits Administration, Inc., more particularly the trust funds administrator, together with that corporation's retained counsel; clearly, they have been, and remain, subject to direction by boards of trustees which must, necessarily, function pursuant to jointly reached decisions, though their members, separately considered, may be responsible to different principals. A determination, therefore, that Majich and his counsel—when they discharge their delegated responsibilities with respect to the collection of delinquent contributions—function as surrogates for a single principal representing their funds' beneficiaries, solely, rather than for both their settlors and beneficiaries, could be considered somewhat strained. See *American Law Institute, Restatement of the Law, Second: Agency 2d*, §1, Comment (b), pp. 8-9; §13, Comments (a)-(c), pp. 58-59; §14 B, Comments (a)-(c), (f), pp. 62-64; §14 L (1), Comment (a), pp. 76-77. See, further, Seavey, *Studies in*

Agency, "The Rationale of Agency—the Relationship," pp. 75-76; 54 Am. Jur. *Trusts* §114. Compare John S. Welch and Hugh S. Wilson, "Applying Traditional Principles of Trust Law to Union and Management Representatives Administering Taft-Hartley Trusts," *Trusts and Estates*, Vol. III, No. 12 (December 1972), pp. 954 ff., in this connection. Further, it should be noted that we are concerned herein with fund spokesmen who have been dealing with a defined group of contractors compassed within a larger group constituting their trustors or settlors. Certainly, this Board could arguably determine, under these special circumstances, that Trust Funds Administrator Majich and retained counsel were representatives, and functioning on behalf of, both trustee groups; that they were discharging a fiduciary duty or responsibility laid upon them by concededly bipartite boards of trustees, rather than pursuing some special objective singlemindedly dictated solely by one of their ultimate principals, and calculated to work toward a coprincipal's disadvantage. The Board could, in short, conclude reasonably that when trust funds spokesmen seek to protect the solvency, integrity, and functional capacity of their funds, they do so not on behalf of their trust's multiple beneficiaries solely, but likewise for the benefit of their trust's composite group of settlors. And the fact that their course of conduct may, *inter alia*, find them telling a contractor (settlor) that his continued failure or refusal to remit contributions—*which he is contractually committed to make, either for his own workers or for those of his delinquent subcontractor*—might ultimately subject him to so-called "job action" by representatives of his covered employees (beneficiaries) should not, therefore, dictate a determination that such trust funds representatives have been functioning beyond the proper scope of their fiduciary responsibilities. Further, with Section 8(e)'s generally pro-

scriptive language found inapplicable herein, no present determination need be made regarding the applicability or nonapplicability of the designated section's construction jobsite proviso. I shall recommend, therefore, that the present complaint be dismissed.

CONCLUSIONS OF LAW

In the light of the foregoing findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. The contractor members of AGC, BIA, EGCA, Sukut-Coulson, and the various business entities collectively designated as Urban Pacific herein are employers within the meaning of Section 2(2) of the Act, engaged in business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act as amended.

2. International Union of Operating Engineers, Local Union No. 12, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

3. Respondent Union has not, as alleged in the complaint, engaged in unfair labor practices proscribed by Section 8(e) or 8(b)(4)(ii)(B) of the Act, as amended.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, I hereby issue the following recommended order:

ORDER[1]

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirely [*sic*].

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[1]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board, and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

DISSENTING OPINION
DECISIONS OF NATIONAL LABOR RELATIONS BOARD.
JOINT COUNCIL OF TEAMSTERS NO. 42

CHAIRMAN MILLER and MEMBER KENNEDY, dissenting:

The reader of this Decision will better appreciate our dissent in this case if we first set forth a description of the posture in which the majority's gossamer opinion would leave this case. We do not agree with the majority that La Mirada was not a neutral person within the meaning of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act. Unlike them, therefore, we must pass on the Administrative Law Judge's different rationale for dismissing the complaint.

Our consideration and rejection of both the majority's and the Administrative Law Judge's rationale are explicated below. Moreover, the fringe benefit provisions of the contract which the Respondent Union applied to La Mirada here are, for all material purposes, identical to those similarly invoked by the charged union in our companion decision, issued today, in *International Union of Operating Engineers, Local Union No. 12 (Griffith Company)*, 212 NLRB No. 4.[1] For the purpose of decisional economy, and because

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[1]In *Griffith* the contract language in issue is the following:

Article I, Paragraph B-15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Fund are not subject to Article V [Proceeding for Settlement of Grievances and Disputes] of the Agreement.

(footnote continued on following page)

this case sheds additional light on the object of such clauses, we have integrated our dissent in the *Griffith* case into our opinion here.

Contrary to the majority, we find that the Respondent Union has entered into and applied the fringe benefit provisions of the contract to La Mirada in violation of Section

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16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

In the instant case the contested language is the following:

102.4.2 The 10th calendar day after such notice is sent by the administrative office, the general contractor shall become financially responsible for all delinquent fringe benefit payments that accrued on his job after the ten-calendar-day-notice period for payments owed by any subcontractor. The contractor may terminate the subcontractor of said delinquent subcontractor, or subcontractors, thereby limiting his liability, on that job, to the period from the 11th day after such notice is sent by the administrative office to the termination of such contract on that job.

102.4.3 Where a contractor contracts with a listed delinquent subcontractor, or subcontractors, the contractor may terminate the subcontract of such delinquent subcontractor, or subcontractors, thereby limiting the contractors liability, on that job, to the period from the commencement of the work under the subcontract to the date of termination of that subcontract.

102.4.4 The union may give written notice to a listed delinquent contractor, or subcontractor, (with a copy to the general contractor) to pay the delinquent amount due all trust funds. Within five days from the giving of such notice, the union shall withhold service from any or all jobs of such delinquent contractors, or subcontractors, if proper payment is not made.

102.4.5 Where the general contractor fails or refuses to make payments required under the above provisions, the union shall have the right to withhold service from any or all jobs of such general contractor,

8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act.[2] For the reasons set forth below, we firmly believe that the Board's

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[2]Three issues which the Administrative Law Judge and, of course, the majority find it unnecessary to pass on are (a) whether the demand for $11,000 supported by the Union's contractual right was coercion proscribed by Sec. 8(b)(4); (b) whether the administrator is an agent of the Union thereby inculpating the latter for its coercive conduct; and (c) whether the 8(e) jobsite proviso has any application to this case.

First, there would seem little room for doubt that the $11,000 demand was coercive. These interrelated fringe benefit clauses of the master agreement not only authorize the imposition of monetary liability, but also sanction a union strike to enforce that liability. Poss, owner of La Mirada, was cognizant that La Mirada would be struck if he failed either to pay or cancel Riphagen's contract. Realistically, La Mirada had no alternative but to cease doing business with Riphagen. We find that the administrator's demand on La Mirada constituted an unlawful coercive threat proscribed by Sec. 8(b)(r)(ii)(B). *Ets-Hokin Corporation*, 154 NLRB 839, enfd. 405 F.2d 159 (C.A. 9, 1968), cert. denied 395 U.S. 921 (1969). See also Member Kennedy's dissenting opinions in *Southern California Pipe Trades District Council No. 16 of the United Association (Associated General Contractors of California, Inc.)*, 207 NLRB No. 58, and *Southern California Pipe Trades District Council No. 16 (Kimstock Division, Tridair Industries, Inc.)*, 207 NLRB No. 59.

Chairman Miller, who did not join Member Kennedy's dissent in the *California* cases cited in the preceding sentence, nevertheless believes the circumstances of this case to be quite different. Assessing an employer with an amount of delinquency liability over which he has had no control, is, in the Chairman's view, quite different from the above cases in which the parties had agreed upon a fair means of determining reasonable compensation for a breach of agreement which was within the parties' control.

Secondly, the trust fund administrator is clearly an agent of Respondent Union. The administrator is hired by the board of trustees of the respective funds. Those boards are composed of an equal number of employer and union appointees who serve at the absolute pleasure of the appointing authorities. The power of the funds, through the administrator, to impose and demand payment of delinquent contributions is delineated in the master agreement itself, along with the Union's rights to strike for failure to comply with the demand. Board precedent clearly holds that the trustees, and their administrators, are agents of the employer associations and the Respondent Union, *J. J. Hagerty, Inc.*, 139 NLRB 633, 637.

Finally, the jobsite proviso to Sec. 8(e) is inapplicable here. The Board has previously held that these identical contract provisions are unlawful self-help clauses proscribed by *Ets-Hokin, supra, General Teamsters, Chauffers, Warehousemen and Helpers, Local 982, IBT (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515.

decisions here and in *Griffith* come dangerously close to eradicating the secondary boycott proscriptions of the Act.

The fallacy of the Administrative Law Judge's basis for dismissal of the compllaint here in *Riphagen*, with which Member Jenkins agrees, needs only brief analysis. The Administrative Law Judge concluded that the principal work unit here is comprised of all employees who work for association members or individual "Short Form" signatories to the master agreement. However, there is no evidence that the short-form employers have ever bargained in the multiemployer unit. Lacking that history, the short-form employers' adoption of the association-negotiated Master Agreement does not suffice to include them in the multiemployer unit,[3] and does not establish an industrywide bargaining unit.[4] Indeed, on this point Members Fanning and Penello are in complete agreement, as evidenced by their opinion in *Griffith*. Clear Board precedent establishes that La Mirada (the coerced contractor) and Merle Riphagen (the primary party) are not part of the same bargaining unit, industrywide or otherwise, but rather comprise separate bargaining and work units.

Hence the basic issue, both here and in *Griffith*, is whether La Mirada and the offended contractors in *Griffith* are secondary persons to the Unions' dispute with their subcontractors. The Supreme Court's oft-quoted statement of the principles determinative of whether activity is "secondary,"

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[3]*Moveable Partitions, Inc.*, 175 NLRB 915. See also *International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California, Inc., Y-A Production, Inc.)*, 197 NLRB No. 134, enfd. 477 F.2d 450 (C.A.D.C., 1973), cert. denied 414 U.S. 1157 (Jan. 21, 1974).

[4]*Raymond O. Lewis, et al. (Arthur J. Galligan)*, 148 NLRB 249.

set forth in *National Woodwork*,[5] holds union conduct to be secondary where:

> . . . the tactical object of the agreement and its maintenance is [the boycotted] employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.[6]

As the Supreme Court also said in this case, Section 8(e) and Section 8(b)(4)(A) were enacted by Congress primarily to close the loopholes in Section 8(b)(4)(B) (formerly 8(b)(4)(A)), and were not intended to alter the previously determined definition of secondary boycott set forth in prior decisions of the Supreme Court. One such decision, together with subsequent Board decisions concerning the same species of contractual arrangements in issue here, requires a conclusion that La Mirada and the offended contractors in *Griffith* are secondary parties. That case is *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), wherein the Supreme Court faced a situation where a general contractor for the construction of a commercial building awarded a subcontract for electrical work to a nonunion employer. The union picketed the entire job and thereby effectively forced the general contractor to terminate the electrical's contract. The Court explicated two principles material to the case at hand. The first was that the union could attain its ultimate purpose only by forcing the general contractor to terminate its contract with the electrical subcontractor. Therefore, it was scarcely open to ques-

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[5]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

[6]*Ibid.* at 645.

tion that *an* object of the strike, if not the only one, was to force the general contractor to cease doing business with the electrical contractor, and therefore the strike violated Section 8(b)(4)(A).[7] Secondly, the Court explicitly held:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or *make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.*[8] [Emphasis supplied.]

Having proceeded this far, something should be said about the majority's "joint business venture" opinion in *Riphagen* herein. Even conceding them their reading of the record,[9] they have failed utterly to supply any legally sufficient nexus in logic or philosophy between their statement on the one hand that La Mirada and Riphagen were engaged in a "joint business venture," and their statement that "this

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[7]Now Sec. 8(b)(4)(B). Thus, Sec. 8(b)(4)(A) was violated where *an* object of the union's conduct was to force a cessation of business, despite the fact that the ultimate purpose of the unions was to have union working standards observed on the project. *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 NLRB 484, enfd. 278 F.2d 287 (C.A. 1, 1960).

[8]*Denver Building Trades, supra*, 689-690. The Court reaffirmed this principle in *N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO*, 400 U.S. 297 (1971).

[9]A concession which we do not make. La Mirada operates by first contracting with either a jobsite contractor who needs fill, or by contracting with a "borrow pit" owner who has sold his fill and needs to have it transported. Riphagen has no part of this facet of the business. And, on the other hand, La Mirada has no control over Riphagen's trucks or his employees.

We also fail to see what C. W. Poss, Inc., has to do with this case, since it was neither named in the complaint nor shown to have been involved in the events herein.

record . . . is insufficient to warrant the conclusion that La Mirada . . . was a neutral or uninvolved person with respect to the operations of Merle Riphagen." This is an inartful exercise in semantics. We recall no case, nor does the majority cite one, where the offended person was not in some way "involved" with the "operations" of the primary person whether it was by virtue of the sale of a product, or by ownership of the construction site, or by purchase of services, particularly by subcontract. Indeed, the majority's analysis would hold that the general contractor and its electrical subcontractor in *Denver Building Trades* were "involved" in the "operations" of each other, that they were therefore a "joint business venture,"[10] and that the Supreme Court necessarily erred in holding the general contractor to nevertheless be a neutral and unoffending person *vis-a-vis the labor relations* of the electrical subcontractor.[11] But the Supreme Court has already ruled that the facts *that the contractor and subcontractor are engaged on the same construction project, and that the contractor had some super-*

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[10]The majority fails to say what they intend by the phrase "joint business venture." To the extent that they construe it to mean that La Mirada and Riphagen are to some degree engaged in the same enterprise, then they also must include the "borrow pit" owner, the construction site owner and his general construction contractor, and presumably the State of California or its subdivisions which built the highways used by Riphagen's trucks.

[11]The majority does not contend that La Mirada and Riphagen are not independent contractors. The complaint alleges, and the answer admits, that La Mirada (as a member of EGCA) and Riphagen each is, and has been at all times material herein, a person engaged in commerce within the meaning of Sec. 8(b)(4)(ii)(A) and (B) and Sec. 8(e) of the Act.

Clearly the General Counsel has met his burden of proving that La Mirada is a *prima facie* neutral and unoffending person *vis-a-vis* the employees and labor relations of Riphagen. In *Griffith*, the majority finds that *prima facie* showing rebutted, a matter dealt with later herein.

Furthermore, the analysis of the majority does not deal with at least half or more of the delinquencies the Union seeks to exact from La Mirada, since even in 1972 Riphagen performed no more than 50 percent of his work for La Mirada.

vision over the subcontractor's work, do not eliminate the status of each as an independent contractor or *make the employees of one of* [*sic*] *the employees of the other. Denver Building Trades, supra.*

During the years since enactment of Section 8(b)(4)(A), the Board has followed these principles in cases too numerous to warrant citation[12] and particularly with respect to the maintenance of agreements just such as are in issue here. In *Calhoun Drywall*,[13] the general contractor was a party to a collective-bargaining agreement containing guarantee fringe benefit clauses which the Board found in *Barker*[14] (wherein the Board previously considered on a *per se* basis the type of clauses presented here) to be essentially identical to the clauses contested here. In *Calhoun*, the general contractor (Oberman) subcontracted drywall work to a nonunion contractor (Calhoun) whereupon the union enforced the fringe benefit guarantee provisions against the general contractor. The union contended, as Respondent Union does here, that the clauses were work standards provisions and therefore primary. The Board rejected this defense, finding that the union's conduct was unlawfully aimed at aiding union members generally. Moreover, the Board said, since the nonunion subcontractor had no employees subject to the collective-bargaining agreement, the fringe benefit funds could not have used the general contractor's payments on behalf of the subcontractor to benefit the latter's employees, and such payments would have been

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[12]See, e.g., *Metal Polishers, Buffers, Platers and Helpers International Union, A.F. of L.*, 86 NLRB 1243.

[13]*Orange Belt District Council of Painters No. 48, AFL-CIO (Calhoun Drywall Company)*, 153 NLRB 1196, enfd. 365 F.2d 540 (C.A.D.C., 1966).

[14]*General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, IBT (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515.

a penalty imposed on the general contractor for failing to subcontract to a union subcontractor. The Board stated:

> It is therefore apparent that if the Respondent's conduct were to be held lawful, it would have to be on the theory that it was designed to protect wages and job opportunities of Oberman's employees, represented by the Respondent Painters, who were engaged in work similar to that done by Calhoun; i.e., drywall construction work. These employees would constitute the "principal work unit." But Oberman employed no painters or tapers or any other employees engaged in drywall construction work on this project; and at no time did Oberman have a contract with the Respondent Painters.[15]

Furthermore, in *Los Angeles Building & Construction Trades Council, et al. (Portofino Marina)*, 150 NLRB 1590, the Board found that the respondent unions were engaged in a primary labor dispute with the subcontractor over the latter's alleged delinquent welfare payments, and that by picketing the general contractor, rather than the subcontractor, the unions violated the *Moore Dry Dock*[16] standards and thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act. The necessary predicate for the Board's conclusion was that the general contractor was not a primary party to the dispute, and the unions were illegally forcing the general contractor to remedy the subcontractor's delinquency. And recently, in *Local 272, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Miller & Solomon Construction Corp.)*, 195 NLRB 1063, the Board found unlawful picketing of a general contractor, who had no contract with the picketing union, with an object

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[15] 153 NLRB at 1201.

[16] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

of forcing the general contractor to make good a defaulting subcontractor's debt ($26.26) to the union's pension and welfare funds. The Board held that the general contractor was a neutral party, not otherwise concerned with the dispute between the union and the defaulting subcontractor.

Turning now to the case at hand, we find that La Mirada, the prime contractor, and Riphagen, the subcontractor, are independent contractors and were doing business within the meaning of the Act.[17] Riphagen is merely a "Short Form" signatory to the Master Agreement and, by virtue of established Board law, each constitutes a separate and distinct bargaining and work unit.[18] It is clear that *an* object of the Union's conduct here was to force La Mirada to cease doing business with Riphagen, inasmuch as that is the action required, and indeed realistically expected, of La Mirada as the only alternative to La Mirada's payment of the $11,000 delinquency allegedly due from Riphagen.[19] On this basis it is apparent that a violation of the secondary boycott sections of our Act has been made out, unless it can be shown that La Mirada's employees' interest in preserving their work or work standards is directly affected by Riphagen's fringe benefit payment delinquencies. Such is the Respondent's defense here, which relies essentially for legal support on the rationale of *Dixie Mining Company*, 188 NLRB 753. The majority also relies on *Dixie Mining* (although they do not cite it specifically), as did the Administrative Law Judge, for their decision dismissing the complaint in *Griffith*. We disagree on two grounds.

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[17]*Denver Building Trades, supra.*
[18]*Moveable Partitions, Inc., supra; Calhoun Dry Wall, supra.*
[19]*Denver Building Trades, supra.*

The first, which in our view disposes of the instant case concerning Riphagen, is that *Dixie Mining* has no applicability to the instant case for the simple, but controlling, fact that La Mirada retains no employees subject to the Master Agreement performing any work covered by its fringe benefit clauses.

The Board recognized this distinction as controlling long ago in *Local 47, International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, AFL, et al. (Texas Industries, Inc.)*, 112 NLRB 923, enfd. 234 F.2d 296 (C.A. 5, 1956). There the Board held that the coerced general contractors clearly were secondaries to the unions' wage dispute with the subcontractors, since the former had only one part-time employee each represented by the unions, as to whom the general contractors had agreed to the wage demands. Rather, the Board held, the unions' concern was with the wages of the subcontractors, and therefore the dispute was not over the conditions of employment of the general contractors' employees or the subcontracting of those employees' jobs, and thus the general contractors were secondary persons. Thus the instant case stands on the same footing as *Miller and Solomon and Calhoun Drywall* where the pressured employers clearly had no interest in or control over the work sought to be preserved and maintained by the union's conduct. The mere fact that La Mirada has signed a short-form adoption of the master agreement in this case is of no importance, since without employees in the covered work classifications that agreement is essentially lifeless. The lack of employees subject to the Respondent Union's jurisdiction clearly eliminates any legitimate interest Respondent Union might have as to who La Mirada does business with, since, as in *Calhoun*, the only principal work unit for which the Union could have an interest in maintaining work standards demonstrably does not exist. Under

controlling precedent, La Mirada is a neutral independent contractor which has no interest in and no right of control over the labor relations between the Respondent and Riphagen. *Denver Building Trades supra; George Koch Sons, Inc.*, 201 NLRB No. 7.

Secondly, assuming *arguendo* that La Mirada employed employees who were covered by La Mirada's contract with the Respondent Union, and thus warranted consideration on the same plane as the pressured contractors in the accompanying *Griffith* case, our view is that the *Dixie Mining* decision is clearly distinguishable. In the present cases, the Unions have applied these fringe benefit guarantee clauses in order to reach jobsites, employers, and work units, so distant in time, distance, and contractual relationship from the pressured contractors, that the Unions' application of the contract to them embroils the contractors in labor disputes unknown to them, and so far removed from them that the contract cannot be construed as protecting the work preservation interest of the coerced contractors' employees.

In *Griffith* the Administrative Law Judge concluded that these contract provisions serve the primary purpose of preserving unit work standards by discouraging subcontracting to persons who supposedly perform covered work more cheaply by virtue of their reduced labor cost[20] resultant from failure to pay fringe benefit contributions.[21] This, the Administrative Law Judge reasoned, was the rationale of *Dixie Mining*.

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[20]There does not appear to be any evidence, either here or in *Griffith*, that this is in fact so.

[21]Contrary to the Administrative Law Judge, we see no relevance in the fact that the prime contractors may recoup their payments from their subcontractors. The issue here is whether the Union may lawfully coerce the prime contractors into making these payments in the first instance.

In *Dixie Mining*,[22] however, the Board was confronted with the application of a labor contract which required that each signatory employer which purchased nonunion coal pay 80 cents per ton into the union welfare fund on coal which the normal 40-cent-per-ton royalty rate had not been paid. The Board found that the evidence established that wage, fringe, and working standards of employees in nonsignatory mines were generally lower than those established in the National Bituminous Wage Agreement and that the 80-cent payment to which signatories were obligated on nonsignatory coal purchases bore a reasonable relationship to the wage and fringe benefits differential between signatory and nonsignatory operators. Accordingly, the Board held that the purpose of the 80-cent clause was to remove the economic incentive a signatory might have to buy coal produced by substandard labor.

The distinction between *Dixie Mining* and the present cases is manifest. In *Dixie Mining* the signatory coal operator was required to make the 80-cent payment only on the coal which *it* purchased from a coal producer using substandard labor, but in the instant cases the object of the Unions' conduct is not merely to require the prime contractors to make equalizing payments with respect to the work which they themselves subcontract and which might affect the work standards of their own employees, but they are also in the Unions' view responsible for the delinquent contributions which their subcontractors became responsible

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[22]Chairman Miller dissented in *Dixie Mining* in any event, and Member Kennedy would not apply the *Dixie Mining* reasoning beyond the facts of that case. Member Kennedy joined the majority decision in *Dixie Mining* only because he viewed the conclusions reached in that case warranted on the facts adduced under the limited scope of the record. Member Kennedy would limit that decision to the peculiar facts of that case.

for while working for *other* persons, at *other* times, at *other* jobsites, as to all of which the prime contractors involved here may have had and probably did have no connection whatsoever on behalf of employees not employed in the work unit for which the prime contractors here are responsible.[23] The jobs on which the subcontractors may have defaulted on the fringe benefit obligations may and probably do no longer exist, and quite likely involved other prime contractors more directly responsible with whom the pressured contractors here may never have had any contact, or who may no longer even be in business.

Thus, in the instant case, Riphagen had been receiving subhauling work from La Mirada since 1968. In 1972 only approximately 50 percent of the subhauling work which Riphagen performed was given him by La Mirada. The Union's claim that Riphagen was $11,000 in arrears on his payments to the fringe benefit funds is not confined to whatever delinquencies Riphagen might have incurred while doing business with La Mirada. La Mirada was never informed of precisely what the $11,000 amount represented. Obviously assuming a state of facts most favorable to Respondent, no more than half of the $11,000 could have accrued while Riphagen was working for La Mirada, if the

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[23]This inquiry is the type which the Supreme Court ruled was necessary in *National Woodwork*. There the Court enunciated the principle that whether the contract and its enforcement violated Sec. 8(e) and 8(b)(4)(B)

> . . . cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work. . . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.
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> [38]As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964).

delinquencies all occurred only during 1972. It is quite clear from a reading of the fringe benefit guarantee clauses in dispute herein, moreover, that that is precisely the intent of the clauses—to reach and impose liability for all delinquencies upon whoever may currently be doing business with the delinquent contractor. The scope of these clauses is immeasurably broader than those in *Dixie Mining*, where the coal mine operator had only to answer for the impact on his employees of his own subcontracting, and did not have to underwrite the harm caused to other work units by the contractual relationships between other persons over whom he had absolutely no control. But here, and in *Griffith*, the Union is in substantial part enmeshing prime contractors in ancient labor disputes of other employers as to work units with which they have no connection, at jobsites which may or may not still be in existence and with which the pressured contractors may or may not have had a connection, and with respect to delinquencies which may be or may not have been legitimately assessed.

In their *Griffith* opinion, the majority discloses their concern for integrity of the trust funds, which they would protect for the benefit of the "interests of employees of all employers." But only employees of signatory employers participate in those benefits, and we cannot imagine any clearer proof that the Unions are seeking to *aid union members generally across unit lines*. As the majority concedes, the Unions are separating the *benefits* from the bargaining units, and are requiring from the employers in each and every bargaining unit an indemnity for union members' benefits no matter where or for whom they work—an indemnity not tied to the maintenance of standards of the bargaining unit, but rather covering the entire industry to the extent of its *union organization*.

One other aspect of the majority's opinion in *Griffith* which causes us grave concern is the notion that employers and unions may do away with the secondary boycott provisions of the Act by private consensus. Section 8(e) prohibits the entering into of any contract whereby the employer agrees to cease doing business with any other person. Voluntarism is completely immaterial.[24] In this regard the majority misreads the Supreme Court's *National Woodwork* opinion, *supra*. The part of the opinion referenced by the majority lies within the Court's discussion, at pages 638-642, of whether *work preservation agreements* were intended to be proscribed by Congress under Section 8(e). But, earlier in its opinion, at pages 633-634, the Court clearly stated that Section 8(e) was enacted to close the loophole in the existing legislation whereby *secondary boycott agreements* themselves were not then unlawful under the Act. We quote:

> The Landrum-Griffin Act amendments in 1959 were adopted only to close various loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions. We discussed some of these loopholes, and the particular amendments adopted to close them, in *Labor Board v. Servette, Inc.*, 377 U.S. 46, 51-54. We need not repeat that discussion here, except to emphasize, as we there said, that "these changes did not expand the type of conduct which

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[24]Member Kennedy pointed this out in his dissents in the *Southern California Pipe Trades* cases, *supra*. Chairman Miller, while not viewing the facts in those *California Pipe* cases as establishing an agreement to cease doing business but rather as an agreement to resolve disputes as to legitimate damages for breach of agreement, agrees with Member Kennedy here (as pointed out in fn. 2, *supra*). In his view, the agreements here would create a liability for an amount of money wholly beyond the employer's control unless he ceased to do business with another entity, and thus are tantamount to agreements to cease doing business.

§ 8(b)(4)(A) condemned, that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer." *Id.*, at 52-53.

Section 8(e) simply closed still another loophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door)*, 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under § 8(b)(4)(A). *Section 8(e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful.* The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, *but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts.* Hearings in late 1958 before the Senate Select Committee explored seven cases of "hot cargo" clauses in Teamsters Union contracts, the use of which the Committee found conscripted neutral employers in Teamsters organizational campaigns. [Fns. omitted.] [Emphasis supplied.]

As we have said, then, the issue is whether the clauses are to preserve work of unit employees, or whether the clauses reach neutral persons and are therefore secondary and unlawful. Since each type of contract is the product of an "agreement," logical analysis of this difference is aided not one whit by the voluntariness of the boycott, since by

Section 8(e) Congress specifically interdicted secondary boycott *agreements*. It is the majority's semantics, not ours, which inject the irrelevancy. We acknowledge that the literal language of Section 8(e) does not provide for the work preservation exception which the Supreme Court held to be encompassed by Section 8(e). While in *National Woodwork* the Court upheld the legality of the agreement, it did so because the union had a primary dispute with its own employer over preserving its members' traditional work tasks which the employer in effect had contracted out. But the Court did not base its holding in any part on the employer's signature to the agreement.

We have expressed ourselves at length in this opinion in setting forth our analysis of why the particular provisions in issue in these cases are *not* directly related to the employees of these neutral contractors. We find that such agreements, however "voluntary," are directly violative of the law Congress passed, as it has been interpreted by the decisions of the highest court in the land. Congress has the power to alter the clear language of the statute and of the decisions of the Supreme Court, but until it does so, the majority decisions in both this case and in *Griffith* leave the Board floundering in the "Bramble Bush."

For the reasons set forth above, we find that the labor disputes caused by the fringe benefit delinquencies are too remote to the coerced contractors here and in *Griffith*, and that the impact of those disputes on the work units of the threatened contractors is oblique and does not make these pressured contractors primary persons to the disputes. We conclude that La Mirada and the pressured contractors in *Griffith* are in fact unoffending secondary persons within the meaning of *Denver Building Trades, supra*, and we would hold that the Respondent Unions have entered into and applied the contract provisions here and in *Griffith*, in violation of Section 8(b)(4)(ii)(A) and (B), and Section 8(e) of the Act.

Supplemental Brief

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FILED
MAY 29 1982
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No. 81-1485
IN THE

Supreme Court of the United States

GRIFFITH COMPANY, J.W. NICKS CONSTRUCTION CO. and SECURITY PAVING CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,

Respondents.

Supplemental Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. 81-1485

IN THE

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October Term, 1981

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NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,

Respondents.

Supplemental Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The within supplemental brief is submitted pursuant to Rule 24(5) of the Court. This brief deals with and calls the Court's attention to two actions of the Court taken subsequent to the filing of our Petition on January 26, 1982.

1. On May 17, 1982, this Court granted Petition for Writ of Certiorari in the case of *Sheppard v. National Labor Relations Board*, Docket No. 81-1627. In that case the Court will resolve the conflicts among the Labor Board and the circuit courts on the issue of the appropriateness of a monetary "make whole" remedy in cases where a violation of Section 8(e) of the Act is shown.

The instant petition raises this identical issue.

The National Labor Relations Board and the Ninth Circuit below held, *inter alia*, that the secondary boycott clauses involved herein were not saved by the construction industry proviso to Section 8(e) of the Act because they authorized the Union to strike for enforcement of the clauses. Nonetheless, the NLRB and the Ninth Circuit refused to order restitution of the monies paid under the coercion of the unlawful clause. In *Sheppard v. NLRB, supra*, the unlawful Section 8(e) clauses are said to likewise coerce money payments.

Similarly, in another case from the United States Court of Appeals for the Ninth Circuit, *(Joint Council of Teamsters No. 42 etc. et al. v. National Labor Relations Board et al.* (A-981)) Justice Rehnquist by order dated May 19, 1982 extended the time of the Union to and including July 1, 1982 to file a Petition for Writ of Certiorari. In Joint Council of Teamsters No. 42, *id.*, the Ninth Circuit, contrary to the District of Columbia Circuit in *Sheppard v. NLRB* and contrary to the instant case, held that a "make whole" monetary order is appropriate in cases where a violation of Section 8(e) is found.

2. The second recent action taken by this Court occurred on May 24, 1982 in which the Court issued its opinion in *Woelke & Romero Framing, Inc. v. National Labor Relations Board*, Case No. 80-1798 *et al.* In that case the Court held . . .

> "that the construction industry proviso to §8(e) of the National Labor Relations Act ordinarily shelters *union signatory subcontracting clauses* that are sought or negotiated in the context of a collective bargaining relationship, even when not limited in application to particular job sites at which both union and nonunion workers are employed."[1] (emphasis added)

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[1] *Woelke & Romero, supra*, slip opinion p. 21.

The instant case presents a secondary boycott clause that goes well beyond a broad union signatory subcontracting clause. The opinions below hold that the construction industry proviso to Section 8(e) of the Act *authorizes the boycotting of union signatory employers with whom the union may have a mere grievance*.

In 1959, the "status quo"[2] intended to be preserved by Congress involved only union signatory clauses. The legislative history so carefully reviewed by the Court in *Woelke & Romero id.*, in no way indicates that Congress intended to authorize clauses that compel the boycotting of union signatory employers with whom the union may have a grievance. Petitioners saw to it that their subcontractor, Urban Pacific, was union signatory. They may lawfully do no more. General contractors may not lawfully be compelled to guarantee that each subcontractor *complies with* the terms of the labor agreement thrust upon it.

The construction industry proviso to Section 8(e) of the Act must be limited to the manifest intent of Congress to authorize union signatory subcontracting clauses. Once the subcontractor is union signatory, it is up to the union and not other general contractors on other job sites to enforce that collective bargaining agreement.

From the early days of organized labor, unions are and have been expected by the public, the courts and their members to enforce their collective bargaining agreements with employers. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). It is eminently reasonable to assume that Congress, acting in 1959 expected that building trades unions, having obtained a collective bargaining agreement with an employer,

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[2]*Id.* p. 11.

would make the individual employer live up to its agreement. Petitioners submit that it is patently unreasonable to assume (as the court below does) that Congress intended to legalize clauses under which general contractors (not labor unions) do the enforcing of collective bargaining agreements.

No where in the legislative history is there the barest reference to any type of clause under which general contractors (not unions) enforce labor agreements. Surely, the Building Trades lobbyists that persuaded Congress to adopt the proviso would have been chagrined or perhaps angered by a suggestion that they are so weak as to not be able to enforce their labor agreements. It is all too obvious that in 1959 the Building Trades Union sought and obtained a "top-down" organizing tool. They did not seek legal sanction for clauses under which a general contractor becomes the primary enforcement mechanism of the collective bargaining agreement thrust upon a subcontractor.

The status quo in 1959 (indeed since the Wagner Act of 1935) was and is that labor unions, (not other employers), enforce collective bargaining agreements on behalf of union members.

In sum the Court's opinion in *Woelke & Romero, supra,* affirms and validates the position of Petitioners that union signatory clauses, and only union signatory clauses are valid under the construction industry proviso.

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 321 U.S. 616 (1975) this court carefully and judiciously closed a loophole in Section 8(b)(7)(C) of the Act.[3] It must not now permit the Labor Board and the circuit courts to open up a vast, new, unlimited gap in our labor

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[3]*Woelke & Romero, supra,* p. 8, n. 8.

laws. This may be the Court's only opportunity to do so because Labor Board cases only arise if the Board's General Counsel is persuaded that under Board precedent there has been a violation of the Act.

Conclusion.

The Court should grant certiorari in this case as a companion to *Sheppard v. National Labor Relations Board*, Docket No. 81-1627 and for the purpose of drawing the line at union signatory clauses.

Los Angeles, California May 28, 1982.

Respectfully submitted,

JOHN H. STEPHENS,

Attorney for Petitioners.

Of Counsel,

GEORGE M. COX and

COX, CASTLE & NICHOLSON.

Appendix

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FILED
FEB 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1485
IN THE

Supreme Court of the United States

October Term, 1981

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,

Respondents.

Supplemental Appendix to Petition for Writ of Certiorari.

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Motion.

United States Court of Appeals for the Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co. and Security Paving Co., Inc., Petitioner, v. National Labor Relations Board, Respondent, and Local No. 12, International Union of Operating Engineers and Operating Engineers Health & Welfare Fund, et al., Intervenors, No. 79-7394.

National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union 12, and Respondent, Griffith Company et al., and Operating Engineers Health and Welfare Fund et al., Intervenors. No. 80-7103.

Filed: December 8, 1981.

Motion of the National Labor Relations Board for Leave to File Proposed Judgment Time Having Expired, is Hereby Granted.

/s/ William C. Canby, Jr.
CIRCUIT JUDGE

Judgment.

United States Court of Appeals for the Ninth Circuit.

Griffith Company, J. W. Nicks Construction Co. and Security Paving Co., Inc., Petitioner, v. National Labor Relations Board, Respondent, and Local No. 12, International Union of Operating Engineers and Operating Engineers, Health and Welfare Fund, *et al.*, Intervenors. No. 79-7394.

National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union 12, Respondent, and Griffith Company, *et al.*, and Operating Engineers Health and Welfare Fund, *et al.*, Intervenors. No. 80-7103.

Before: Canby and Reinhardt, Circuit Judges, and Hill,* District Judge.

The above consolidated cause came on to be heard upon a petition to review filed by Griffith Company; J. W. Nicks Construction Co., and Security Paving Co., Inc. and on an application for enforcement of a supplemental order of the National Labor Relations Board issued on August 6, 1979, against International Union of Operating Engineers, Local Union 12, Los Angeles, California, its officerrs, agents, and representatives. The Court heard argument of respective counsel on May 8, 1981, and has considered the briefs and transcript of record filed in this cause. On October 26, 1981, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's supplemental order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

---

*The Honorable Irving L. Hill, United States District Judge, for the Central District of California, sitting by designation.

Petitioner, International Union of Operating Engineers, Local Union 12, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing article I, section B, paragraphs 15 through 16(a), of its Master Labor Agreement, to the extent found unlawful herein by reason of the self-enforcement provisions, or from entering into, maintaining, giving effect to, or enforcing any other contract or agreement, express or implied, whereby AGC, BIA, and EGCA, on behalf of their employer-members or employers represented by them, agree to cease or refrain from doing business with any other person in violation of Section 8(e) of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action found to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 21 (Los Angeles, California, of the National Labor Relations Board), after being duly signed by an authorized representative of the Petitioner Union, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Petitioner Union to insure that said notices are not altered, defaced, or covered by other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner Union has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ Richard H. Deane
Richard H. Deane
Clerk

/A TRUE COPY,
ATTEST:
Richard H. Deane
Clerk

APPENDIX

D—5362

NOTICE TO EMPLOYEES AND MEMBERS

"POSTED PURSUANT TO A JUDGMENT OF UNITED STATES COURT OF APPEALS ENFORCING AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL NOT enter into, maintain, give effect to, or enforce article I, section B, paragraphs 15 through 16(a), of our Master Labor Agreement, to the extent found unlawful because of the self-enforcement provisions contained therein.

WE WILL NOT enter into, maintain, give effect to, or enforce any other contract or agreement, express or implied, whereby Associated General Contractors of California, Inc., Building Industry Association of California, Inc., and Engineering and Grading Contractors Association Inc., on behalf of their employer-members or employers represented by them, agree to cease or refrain from doing business with any other person in violation of Section 8(e) of the National Labor Relations Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed

to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, California 90014, Telephone 213—688—5229.

Certificate of Service.

United States Court of Appeals for the Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co. and Security Paving Co., Inc., Petitioner, v. National Labor Relations Board, Respondent, and Local No. 12, International Union of Operating Engineers and Operating Engineers, Health and Welfare Fund, *et al.*, Intervenors. No. 79-7394.

National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union 12, Respondent, and Griffith Company, *et al.*, and Operating Engineers Health and Welfare Fund, *et al.*, Intervenors. No. 80-7103.

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned matter has this day been served by first class mail upon the following counsel at the addresses listed below:

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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington D. C.,
this 13th day of November, 1981.

Opposition

1

Supreme Court, U.S.
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No. 81-1485
IN THE

Supreme Court of the United States

October Term, 1981

GRIFFITH COMPANY, J. W. NICKS CONSTRUCTION COMPANY and SECURITY PAVING COMPANY, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOCAL NO. 12, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION OF OPERATING ENGINEERS HEALTH AND WELFARE FUND, ET AL.

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Questions Presented.

1. Did the Court of Appeals correctly rule that the construction proviso to Section 8(e) permits a union and an employer in the construction industry to agree to resolve, or remove from the site of construction, a labor dispute between the union and another employer working at the site?

2. Did the Court of Appeals correctly rule that the staff administrator and counsel for employee benefit trust funds were not union agents for purposes of threatening a strike, and that the union did not engage in prohibited self-help in violation of Section 8(b)(4)(B)?

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Respondents.

BRIEF IN OPPOSITION OF OPERATING ENGINEERS HEALTH AND WELFARE FUND, ET AL.

Respondents Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Southern California Operating Engineers Apprentice Training Trust pray that the petition for a writ of certiorari to review the decision issued on October 26, 1981, and the judgment entered on December 8, 1981, by the U.S. Court of Appeals for the Ninth Circuit be denied. The decision of the Court of Appeals is officially reported at 660 F.2d 406.

STATEMENT OF THE CASE.

Statement of the Facts.

Petitioners ("Griffith", "Nicks" and "Security", collectively called "the Employers") are bound to the Master Labor Agreement ("MLA") negotiated between the International Union of Operating Engineers, Local Union No. 12 ("Local 12") and the Southern California General Contractors Associations ("Associations"). The MLA requires the Employers to pay contributions on behalf of their covered employees to the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Southern California Operating Engineers Administrating Trust (together called the "Trusts" or the "Trustees"). The Trusts are organized and operated pursuant to Section 302(c)(5) and (6) of the Labor Management Relations Act of 1947, as amended ("LMRA") [29 U.S.C. §186(c)(5), (6)].

Each of the Trusts holds all funds received in a "common pool" from which benefits are paid. Pet. App., pp. 30, 68.[1] Each employee of a contributing employer receives credit in the records of the Trusts for all covered employment, regardless of whether his employer actually pays the obligated contributions or becomes delinquent. Pet. App., pp. 30, 104. By that approach, the risk of loss arising from employer delinquency is spread evenly among all employees participating in the Trust. By the same token, each employee of every contributing employer, including Griffith, Nicks and Security, is damaged by indirect financial loss whenever

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[1] "Pet. App." references are to the decisions of the NLRB and the Court of Appeals set forth in the appendix to the petition, followed by designation of the pages of relevant material.

any contributing employer fails to pay obligated contributions to the Trusts. Pet. App., pp. 102-107.

In light of this circumstance and mounting employer delinquencies to the Trust, Local 12 and the Associations reached agreement in 1969 on new provisions to be included in the MLA.[2] The bargaining parties agreed to restrict subcontracting any work at the jobsite to any employer named as delinquent on a list furnished to the Associations by the administrator of the Trusts. If an employer bound to the MLA subcontracts work to an employer named on the delinquency list, the employer becomes liable to the Trusts for "all accrued delinquencies" of the subcontractor.

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[2]The relevant provisions of the MLA are as follows:

"15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractor Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

"(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V of the Agreement.

"16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

"(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor." Pet. App., pp. 3, 31.

Paragraph 16(a) of the MLA reserved to Local 12 the right to take economic action against the employer failing to make the obligated payment to the Trusts.

Griffith, Nicks, Security and two other employers bound by the MLA each subcontracted work at its construction jobsite to a listed delinquent employer known as Urban Pacific. Pet. App., pp. 56, 74-76. Each of the Employers had its own employees covered by the MLA working at the sites on which Urban Pacific performed work as a subcontractor. Pet. App., pp. 96-97.

The subcontracting of jobsite work to Urban Pacific by these five employers was discovered by a field representative of the Trusts in January, 1973. At a conference with the Trust administrator on February 2, 1973, representatives of Nicks, Security and a fourth employer (Sukut-Coulson) agreed that each would promptly pay one-seventh of Urban Pacific's total delinquency, pending a further search for additional employers who might have subcontracted work to Urban Pacific and become jointly liable. Thereafter, each responsible employer would pay a proportionate share of Urban Pacific's delinquencies. Pet. App., 76. Security and a fifth employer (Zurn) promptly paid the Trusts approximately $4,000.00 each. No other jointly liable employers were found, and the five employers were subsequently requested by the Trusts to pay one-fifth of Urban Pacific's delinquency, or a total of about $5,400.00 each. However, the five employers declined to make further payments and, on or about February 12, 1973, the administrator of the Trusts notified Local 12 that Local 12 had the right to withhold services from any or all jobs of the five employers pursuant to paragraph 16(a) of the MLA. Discussions continued between legal counsel for the five employers and legal counsel for the Trusts during which counsel for the employers was told that, if the five employers did not pro-

ceed to pay the accrued delinquency of Urban Pacific, the administrator of the Trust would renew the notice to Local 12 regarding Local 12's right to proceed in the manner specified in paragraph 16(a) of the contract. Pet. App., pp. 77-78. The five employers filed the unfair labor practice charges in this case on March 8, 1973. The record reflects no other payments to the Trust other than the two payments of $4,000.00 each by Security and Zurn.[3]

At the formal hearing, the General Counsel of the NLRB relied only upon the written trust agreements establishing the Trusts as evidence that the Trust administrator and counsel were agents of Local 12. The trust agreements expressly insulate each Trust from control by Local 12, and further provide that nothing in their terms "shall be deemed to authorize or prevent economic action" by Local 12.

The Proceedings Below.

The unfair labor practice charges filed by the Employers claimed that the disputed clauses of the MLA were unlawful under Section 8(e) of the National Labor Relations Act ("Act") [29 U.S.C. §158(e)], and that the communications received from the trust administrator and counsel were threats of strike by Local 12 in violation of Section 8(b)(4)(B) of the Act [29 U.S.C. §158(b)(4)(B)]. The Administrative Law Judge disagreed, concluding that the clauses served a lawful, primary purpose by protecting the financial interests of employees in each individual bargaining unit against losses resulting from delinquencies of other contributing employers of the Trusts. The Administrative

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[3]Allegations in the petition of additional payments to the Trust are completely outside the record. The Employers never filed a motion with the NLRB seeking to reopen the record of the formal hearing, either before the Board's original decision or thereafter as provided by Sections 102.47 and 102.48(d) of the NLRB Rules and Regulations.

Law Judge concluded that the disputed clauses were designed and intended to protect the fringe benefits of workmen in each separate bargaining unit and, therefore, were "germane to the economic integrity" of each bargaining unit, as "work preservation" and "union standards" clauses had been found to be in other contexts. Pet. App., pp. 106-107. The Administrative Law Judge concluded that the disputed clauses actually do function as "union standards" clauses in preserving work for the employees of the prime contractor by removing the economic incentive to subcontract to a delinquent employer, and by preserving the financial integrity of fringe benefit contributions paid on the prime contractor's own employees. Pet. App., pp. 107-110.

The Board agreed with the Administrative Law Judge that the "critical question" is whether the disputed clauses are "substantially in the interest and for the protection of the employees" of the subscribing employers, and that this question must be answered "in relation to multiple units of employees whose employers have bound themselves . . ." Pet. App., pp. 49-50. The Board also agreed that the clauses were "substantially in the interest and for the protection of the employees" in each relevant unit, noting that "work preservation" and "union standards" agreements generally occur in the context of a "union signatory" requirement. Acknowledging the "unusual context that all employers involved have signed the same restrictive agreement" with Local 12, the Board's critical examination concluded that "[t]his agreement and its maintenance is addressed solely to the labor relations of the contracting employers vis-a-vis their own employees." Pet. App., pp. 51-52. Accordingly, the Board dismissed the complaint in its entirety.

The Court of Appeals viewed the disputed clauses as designed to pressure delinquent subcontractors to pay their

debts to the Trusts and to protect trust fund benefits by making other responsible parties liable for the delinquencies, and concluded that these are secondary motives. Pet. App., pp. 39-40. The Court of Appeals saw the tactical object of the agreement as being interference with the labor relations policy of Urban Pacific, and not as an attempt to influence the labor relations policy of Griffith, Nicks or Security. The Court of Appeals treated Local 12 as having a dispute only with Urban Pacific, and Griffith's only offense as doing business with Urban Pacific. Secondly, in examining the allocation of benefits of the agreement, the Court of Appeals viewed the disputed clauses as distributing benefits uniformly over all relevent work units participating in the Trusts, and reasoned that since a multiplicity of work units would be benefited, rather than only the single employer unit making the agreement, this allocation of benefits reflected a "secondary" motive. Pet. App., pp. 40-44. The Court of Appeals concluded that Local 12 could simply avoid dealing with "fly by night" subcontractors such as Urban Pacific, rather than trying to enmesh secondary employers in the resulting disputes. The Court of Appeals remanded the case to the Board to determine whether the clauses are valid under the construction industry proviso to Section 8(e) and to determine whether the Trusts' administrator and counsel were agents of Local 12 for purposes of threatening a strike in violation of Section 8(b)(4).

The Trustees and Local 12 filed a petition for a writ of certiorari in this Court seeking review of the original decision of the Court of Appeals, but the Employers responded that the case was not ripe for review when the Board had not considered all issues. The petition was denied. 434 U.S. 854 (1977).

On remand, the Board did not embrace the views of the Court of Appeals as its own (Pet. App., pp. 13, 18), but

proceeded to conclude that the scope of the construction proviso to Section 8(e) covers the agreement making the Employers liable for the accrued delinquencies of Urban Pacific for having violated the restriction on subcontracting to a delinquent employer. In so ruling, the Board considered and rejected contentions that the construction proviso covers only "union signatory" clauses, and that even those clauses must be expressly limited to times and places where the signatory employer actually employs individuals covered by the agreement. The Board cited persuasive legislative history supporting its conclusion that the protection of the priviso was intended to cover clauses with secondary objectives concerning jobsite work, regardless of the precise relationship between the general contractor and the subcontractor. Pet. App., pp. 21-22.

The Board then proceeded to sever and invalidate paragraph 16(a), which gave Local 12 the option to take economic action as an impermissible self-enforcement feature. Pet. App., p. 23. The Board further concluded that the Trust's administrator and counsel were not agents of Local 12 for purposes of threatening a strike, since factors giving rise to an agency relationship were "totally absent", and that Local 12 did not violate Section 8(b)(4)(B) of the Act. Pet. App., pp. 24-25.

The Court of Appeals likewise rejected the contention that the construction proviso permits only "union signatory" clauses intended solely to prevent jobsite friction between union and non-union workers. The Court of Appeals concluded that the proviso permits "an agreement which serves the community of interests at the jobsite", and reasoned that an agreement which removes a primary strike from the construction site serves the community of interests there. Pet. App., pp. 6-7. The Court of Appeals noted that Local 12 could engage in a primary strike against the de-

linquent subcontractor at the construction site, which would be "exactly the type of dislocation at the jobsite that the construction industry proviso was intended to prevent." The Court of Appeals proceeded to affirm the rulings of the Board that only paragraph 16(a) was to be severed and invalidated, and that the Trusts' administrator and counsel were not agents of Local 12. Accordingly, the Court of Appeals enforced the order of the Board in its entirety.

REASONS FOR DENYING THE WRIT.

SUMMARY.

The petition attempts to persuade the Court that the construction proviso to Section 8(e) intended to permit only "hot cargo" agreements with "union signatory" organizing motives, and secondary agreements directed to resolving primary labor disputes at the construction site are prohibited. As the Court of Appeals concluded, this contention is unsupported by the language, legislative history or policies of the statute, and thus fails to present a significant issue for decision by this Court.

The construction proviso to Section 8(e) expressly permits "cease doing business" agreements between a union and an employer in the construction industry "relating to the contracting or subcontracting of work to be done at the site of construction . . ." The language of the statute limits the nature of agreements covered only by requiring that the agreements relate to "contracting or subcontracting of work to be done at the site . . ."

The legislative history of Section 8(e) and the construction proviso shows that "hot cargo" agreements commonly directed "cease doing business" and "do not handle" requirements at any employer with whom the union had a dispute, not just at nonunion employers. Such agreements were lawful before enactment of Section 8(e), and Congress intended to preserve the lawfulness of such agreements on the construction site by enactment of the construction proviso.

Congress authorized the continued use of "hot cargo" agreements at the construction site as a means of providing for the voluntary resolution of disputes which otherwise could result in a primary strike and picketing at the site. Voluntary approaches to resolving such disputes were

viewed by Congress as a means of enhancing productivity and economic efficiency in the largest segment of the work force, because a primary strike and picketing of one employer at the site could disrupt the work of many other employers and their employees under the circumstances of the "close community of interests" at the site.

The Court of Appeals properly and easily found the disputed clauses in this case to be sheltered by the construction proviso, because Local 12 undoubtedly had the right to take primary economic action against the delinquent subcontractor, Urban Pacific. In advance of this eventuality, the Associations representing the Employers in collective bargaining agreed with Local 12 that each of the Employers would become jointly liable with Urban Pacific for the accrued delinquencies to the Trust. Congress envisioned precisely this kind of consensual, peaceful resolution of legitimate labor concerns which might otherwise interfere with the progress of work by other employers at the site.

In addition, the Court of Appeals properly considered that the employees of each of the Employers suffer a financial loss in the value of their own fringe benefits as a result of other employers' delinquencies in the "common pool" trust accounts, and are entitled to bargain for arrangements which protect against such losses.

Notwithstanding the original decision of the Court of Appeals holding the collection of delinquent amounts from Urban Pacific to be a secondary motive of the disputed clauses, the economic interests of the employees of Griffith, Nicks and Security should provide those employees a primary right to bargain for clauses reasonably designed to protect such vital economic interests. Moreover, the benefits derived from the resulting agreement should be permitted to flow to employees in all or any part of the multiemployer bargaining unit with which Local 12 bargains. Considering

these matters together with the fact that Griffith, Nicks and Security each became an "ally" of Urban Pacific by subcontracting site work to Urban Pacific with actual or constructive notice from the delinquency list published by the Trusts that Urban Pacific was subject to strike action by Local 12, the disputed clauses do not seek to enmesh truly "neutral" employers in a labor dispute which is not their own.

Finally, within the limits of the original decision of the Court of Appeals that the disputed clauses have a secondary motive, the Board and the Court of Appeals properly concluded that the communications between counsel for the Trusts and counsel for the Employers concerning the accrued delinquencies of Urban Pacific could not constitute a threat of strike by Local 12 in violation of Section 8(b)(4)(B), because neither the Trusts nor their counsel are agents of Local 12. The decisions of this Court, the courts of appeals and the Board establish that trustees of joint labor-management trusts are independent fiduciaries who are not subject to the control of the appointing employers or unions.

I.

The Construction Proviso to Section 8(e) Permits Secondary Agreements Directed to Resolving Primary Labor Disputes With Employers Working at the Site of Construction.

A. The Language of the Proviso Does Not Restrict Its Coverage to Agreements With "Union Signatory" Organizing Motives.

The language of the statute is conclusive in the absence of a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*,447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). Enacted in 1959, Section 8(e) declares any agreement between a labor organization and an employer, by which the

employer agrees to cease doing business with or to cease handling products of any other employer, to be an unfair labor practice, unenforceable and void. However, the construction proviso to Section 8(e) states:

> "That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work . . ." 29 U.S.C. §158(e).

In this case, the Employers are concededly employers in the construction industry, and their collective bargaining agreement with Local 12 covers work of their employees at construction sites. The disputed clauses prohibit each of the Employers from subcontracting such work to any other employer who is named on a published list as delinquent in payment of fringe benefit contributions to the Trusts. If that restriction on subcontracting of work to be performed at the construction site is violated, the offending Employer becomes jointly liable for the accrued delinquencies of the subcontractor. Those provisions of the collective bargaining agreement clearly and unambiguously are agreements "relating to the . . . subcontracting of work to be done at the site of the construction . . .", and accordingly are within the language of the proviso to Section 8(e).

B. Congress Intended to Preserve the Legality of Secondary Agreements at the Construction Site in Order to Enhance Labor Peace and Productivity.

The construction proviso to Section 8(e) was enacted as part of a congressional design to preserve the *status quo* of the existing pattern of collective bargaining in the construction industry. *National Woodwork Manufacturer Association v. NLRB*, 386 U.S. 612, 637-38, 87 S.Ct. 1250, 1265

(1967). *Cf., NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335, 348-49, 98 S.Ct. 651, 659 (1978). Senator Kennedy, as Chairman of the Senate conferees, explained the Conference Agreement on the legislation as follows:

> "The first proviso under new Section 8(e) of the National Labor Relations Act *is intended to preserve the present state of the law* with respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project. . .*
>
> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under Section 8(e). *The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. . . .*" (Emphasis added.) *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, 1433 (hereinafter "Leg. Hist.").

See also, Report of the Committee on Conference, H.R. Rep. No. 1147, 86th Cong., 1st Sess., 39 (1959).[4]

The petition argues that the proviso intends only to alleviate friction between union and non-union workers on the jobsite by allowing agreements to impose "union signatory" requirements on subcontractors. However, hot cargo agreements designed to pressure unionized employers engaged in labor disputes were undoubtedly existing and lawful in 1959. In fact, the decision of this Court in the *Sand Door* case [*Local 1976, United Brotherhood of Car-*

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[4]"To the extent that such agreements are legal today under Section (b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e)."

penters v. NLRB, 357 U.S. 93, 78 S.Ct. 1011 (1958)], actually disposed of two consolidated cases involving a Teamster "hot cargo" clause directed at any "unfair company", which was used to pressure American Iron & Machine Works, an employer "engaged in a controversy with Local 850 of the International Association of Machinists, the bargaining representative of its production and maintenance employees . . ." *Id.*, 357 U.S. at 96-97, 78 S.Ct. at 1014-15. Of course, this Court held in the *Sand Door* decision that picketing to enforce such an agreement was a violation of Section 8(b)(4), but noted that the voluntary execution and observance of such an agreement by an employer was not unlawful. *Id.*, 357 U.S. at 108, 78 S.Ct. at 1020. The legislative history of the construction proviso clearly shows that Congress intended to preserve the legality of such agreements when related to the subcontracting of work to be performed at the site of construction.

The legislative history of the construction proviso also shows that Congress was keenly aware of the existing state of the law governing picketing at the site of construction as reflected by *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943 (1951) and the decision of the Board in *Moore Dry Dock Co.*, 92 NLRB 549 (1950). See II Leg. Hist. 1433, *supra*. These decisions established that subcontractors on construction sites were to be treated as independent employers and, in addition, placed limitations on picketing directed at a particular employer. Although the construction trades unions would have preferred a statutory reversal of *Denver Building Trades* to permit "common situs" picketing of the entire construction site to resolve a dispute involving any subcontractor, enactment of the proviso to Section 8(e) took a different approach toward resolving the dilemma facing the construction unions and employers.

The key ingredient in the differing approach taken by Congress was the emphasis placed upon *peaceful* resolution of labor disputes at construction sites. Without the proviso, Section 8(e) would have outlawed the existing use of secondary agreements to resolve jobsite disputes. Deprived of the use of such agreements, trades unions would necessarily have been required to place greater reliance on primary strikes and picketing. Even under the constraints of *Denver Building Trades* and *Moore Dry Dock*, the increased picketing and strikes would inevitably disrupt the progress of work by other employers, given the "close community of interests" at the site.[5] Thus, by authorizing voluntary, consensual agreements as an alternative to primary strikes and picketing at the construction site, the proviso to Section 8(e) benefited both construction employers and unions. At the same time, Congress achieved a continuing, overriding objective of national labor policy by enhancing productivity and efficiency in the nation's largest employing industry.[6]

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[5]In criticizing the Court of Appeals' understanding of the term "community of interest" (*Pet.* pp. 17-18), the petition misquotes, misattributes and misinterprets the concept. "Close community of interests" was the phrase used by this Court in *National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. at 639, 87 S.Ct. at 1265, to describe the reason for preserving the lawfulness of hot cargo agreements at the construction site. "Interests" (not "interest", as used in the petition) is easily understood as encompassing employer entities and concerns, as well as union entities and concerns, represented at the site. "Close community" refers to the relatively small physical proximity of construction sites and the customary intermingling of craftsmen and supervisors employed by different subcontractors during the course of erecting a construction project.

[6]*See* Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, n. 6 (1951). This commentary was cited by this Court in *National Woodwork*, 386 U.S. at 639, n. 32, 87 S.Ct. at 1265, pertaining to the "close community of interests" justification for enactment of the construction proviso to Section 8(e).

C. The Arguments Presented by the Petition Are Not Sufficiently Meritorious to Warrant the Attention of the Court.

As in its failure to respect the integrity of the factual record, the argument presented by the petition (Pet., pp. 14-20) does not fairly reflect the actual holding of the Court of Appeals.[7] Essentially, the Court of Appeals held that the community of interests at the jobsite is served by an agreement designed to avert a primary strike against a subcontractor working at the site, and the construction proviso intended to authorize agreements to avert "dislocation at the jobsite" resulting from such a strike.

The petition characterizes this reasoning as merely "another justification for its holding" (Pet., p. 18) and branded as a "bizarre notion" the idea that the proviso is intended to prevent "dislocation at the jobsite". Quite amazingly, the petition adds that the proviso concerns only "secondary boycott agreements" and "simply has nothing to do with legitimate primary strike activity by a union." Pet., p. 19. These assertions in the petition show a remarkable lack of appreciation for the inherent nature of secondary agreements as the source of added pressure to resolve primary labor disputes, or for the congressional purpose in permitting such agreements relating to work performed at the jobsite.

Contrary to the petition, the Court of Appeals suggested no "unprecedented . . . broad interests" in the nature of

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[7]The essence of the Court of Appeals' analysis is as follows:

"We believe that paragraphs 15 and 16 of the MLA serve the community of interests at the jobsite and consequently fall within the proviso . . . When a general contractor engages a subcontractor who is delinquent in his trust fund payments, that subcontractor's employees may engage in a primary strike at the work site. Such a strike can cause exactly the type of dislocation at the jobsite that the construction industry proviso was intended to prevent. Moreover, because contributions to the pension system are pooled into one account, the delinquency of the subcontractor affects the welfare, through the pension benefits, of all employees at the jobsite. . . ." (Pet. App., pp. 6-7.)

employee benefits as "protected by the proviso." Pet., p. 15. The Court of Appeals merely noted that the employees of Griffith, as well as the employees of each other employer participating in the Trusts, experience a financial loss through uncollected delinquencies to the "common pool" trusts, and the disputed clauses are designed to protect those financial interests. Pet. App., p. 7.

II.

The Court of Appeals Correctly Held That the Trusts and Their Administrator and Counsel Are Not Agents of Local 12, and That Amounts Paid to the Trusts as Obligated by the Collective Bargaining Agreement Should Not Be Refunded.

The General Counsel of the Board relied only upon the trust agreements establishing the Trusts as evidence of an agency relationship between Local 12 the Trusts' administrator and counsel. This Court has held that trustees of such labor-management trusts are independent fiduciaries and are not agents of the employers and labor organizations who appoint them. *NLRB v. Amax Coal Company*, ... U.S. ...., 101 S.Ct. 2789 (1981). The Board concluded that factors giving rise to an agency relationship were "totally absent", and the Court of Appeals agreed. Since Local 12 was uninvolved and no violation of Section 8(b)(4)(B) had occurred, the Board and the Court of Appeals declined to order refund of $4,000.00 shown by the record to have been paid by Security to the Trusts as a pro rata share of the accrued delinquencies of Urban Pacific. To do otherwise would have provided a windfall to an employer who had chosen to settle the contract rights of the Trusts.

III.

The Petition Is Without Merit Because the Disputed Clauses Are Not Directed at Neutral, Secondary Employers.

The Board originally concluded that the disputed clauses serve lawful primary purposes and have no secondary motive.[8] The original decision of the Court of Appeals found two secondary motives. First, the Court of Appeals found that the "tactical object" of Local 12 was to influence the labor relations of Urban Pacific. Accepting the premise that *an* object of the clauses was to influence Urban Pacific, the further conclusion that this object is *secondary* requires that the boycotting employer (Griffith) be "genuinely neutral"[9] and unoffending in the labor dispute involving Urban Pacific.

The evidence in this case shows that the disputed clauses were directed at general contractors, such as Griffith, Nicks and Security, who deliberately subcontract work to delinquent employers in order to obtain an unfairly low subcontract price. Such cut-rate subcontracting causes Griffith's own employees to lose work which could otherwise be done competitively by them. What is worse, Griffith's use of the delinquent subcontractor causes additional financial losses to Griffith's own employees in their fringe benefit contributions paid to the "common pool" Trusts. These actions by Griffith against the financial interest of its own employees are not done innocently, but with an eye toward undercutting the compensation standards of its employees for its own

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[8]Contrary to the assertion in the petition (Pet., p. 14), the previous denial of the Trusts' petition for certiorari seeking review of the original decision of the Court of Appeals does not establish that original decision as the law of the case.

[9]*National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. at 624-626, 635, 87 S.Ct. at 1257-59, 1263.

economic advantage and with full knowledge, furnished by the published delinquency list, that Urban Pacific is subject to strike action by Local 12 if found on a jobsite. This is not the circumstance of a "genuinely neutral" employer "wholly unconcerned" with the offense of Urban Pacific, but more accurately is an alliance by which Griffith and Urban Pacific each offends its own employees through the subcontracting arrangement. In that light, even if an object of the clauses is to influence Urban Pacific, that object is not secondary because Griffith is not a neutral employer.

The other secondary motive identified by the original decision of the Court of Appeals is derived from its analysis of the permissible allocation of benefits produced by the clauses. The Court of Appeals reasoned that the clauses were negotiated in the multiemployer bargaining unit represented by the Associations, but that the collection of delinquencies through use of the clauses is beneficial to the employees of employers in other bargaining units, rather than benefiting solely the employees in the multiemployer bargaining unit. Pet. App., pp. 40-43.[10] Thus, because the disputed clauses could not be effectively designed to benefit solely the multiemployer unit, and because Local 12 also represents the other bargaining units, the Court of Appeals ascribed a secondary motive to Local 12 and thereby brought the clauses under the proscription of Section 8(e). This analysis by the Court of Appeals effectively imposes a

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[10]The Court of Appeals reached that result even though the record indicates that approximately 60% of the contributions received by the Trusts for work in the eleven counties of Southern California are received from employers in the multiemployer bargaining unit. Pet. App., p. 67. The Court of Appeals properly should have "eschew[ed] a mechanical application" of the allocation of benefits inquiry and enforced the Board's administration of the "totality-of-the-circumstances test recognized in *National Woodwork*." *Cf., NLRB v. Enterprise Association*, 429 U.S. 507, 521-25, 97 S.Ct. 891, 900-01 (1977).

"conflict of interest" upon unions which represent more than one bargaining unit in multiemployer trusts. Unions are properly entitled to protect fully the primary bargaining interests of employees in the bargaining unit, allocating benefits to all or any part of the multiemployer unit as the bargaining representative deems warranted,[11] even when some benefits of that primary bargaining activity fall incidentally outside the unit,[12] without being subject to the inhibitions imposed by Section 8(e) on secondary agreements.

CONCLUSION.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: March 31, 1982.

Respectfully submitted,

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[11]As in choosing uniform or "uneven application of economic pressure" in multiemployer bargaining (*cf., Bonanno Linen Service, Inc. v. NLRB*, ... U.S. ...., 102 S.Ct. 720, 726-27 (1982), the bargaining representative has discretion to determine the appropriate allocation of benefits within the multiemployer unit.

[12]*Cf., NLRB v. Enterprise Association, supra*, 429 U.S. at 526, 97 S.Ct. at 902.

Opposition

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Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1485

In the Supreme Court of the United States

OCTOBER TERM, 1981

GRIFFITH COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), privileges collective bargaining agreement clauses that bar the subcontracting of construction site work to firms delinquent in their obligations to a construction employee fringe-benefit trust fund and that also require any contractor who does subcontract to a delinquent employer to assume responsibility for the subcontractor's accrued obligations to the trust fund.

2. Whether substantial evidence supports the Board's findings that neither the administrator of the trust fund nor his counsel was an agent of the Union and that a violation of Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), was therefore not established by evidence that those persons threatened the invocation of a provision permitting the Union to strike employers who do not fulfill their financial obligations under the fringe-benefit delinquency clauses.

3. Whether, in the absence of evidence that the Union used illegal coercion to enforce compliance with the fringe-benefit delinquency clauses, the Board reasonably declined to issue a reimbursement order.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals is reported at 660 F.2d 406 (Pet. App. 1-11) and its earlier opinion remanding the case to the National Labor Relations Board is reported at 545 F.2d 1194 (Pet. App. 29-47). The Supplemental Decision and Order of the National Labor Relations Board are reported at 243 N.L.R.B. No. 1121 (Pet. App. 12-18), and its original Decision and Order, prior to the remand, are reported at 212 N.L.R.B. 343 (Pet. App. 48-132).

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1981 (Supp. Pet. App.). The petition

for a writ of certiorari was filed on January 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners—Griffith Company, J. W. Nicks Construction Company and Security Paving Company, Inc.—are general contractors in Southern California. All are members of a construction industry trade association that negotiated a Master Labor Agreement (MLA) with Local 12 of the International Union of Operating Engineers ("the Union"). A large number of other contractors individually negotiated "short form" agreements with Local 12 that incorporated by reference most of the terms and conditions of the MLA. (Pet. App. 14, 29-30.)

The agreement establishes four employee benefit trusts pursuant to Section 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. 186(c)(5). Each trust is jointly administered by a board of trustees composed of members appointed in equal numbers by the employer groups and the union. The funds are managed by a hired administrator. (Pet. App. 14-15.)

Contributions to each trust are pooled into one account. An employee's eligibility for benefits is not dependent on whether his employer has actually contributed to the trust. The employer's failure to contribute, however, decreases the total funds in the pool and thereby results in reduced benefits for all beneficiaries. As the size of the required trust payments has increased, so too has the number of employers who are delinquent in their payments. (Pet. App. 30.)

The Union has employed various methods to combat the delinquency problem. Under the most recent approach—set forth in paragraphs 15 and 16 of the MLA—firms that are delinquent in their contributions and are unable to reach a settlement with the trustees are placed on the fund's official delinquency list. Copies of this list are sent to the signatory contractors and the Union. Paragraph 15 of the MLA provides that no employer shall contract any work to a delinquent subcontractor until the subcontractor has paid all delinquent amounts. Paragraph 16 provides that, if an employer violates paragraph 15 by hiring a subcontractor then listed as delinquent, the employer is liable for all prior delinquent payments even if those payments were not incurred as a result of work done at the employer's worksite. If the subcontractor becomes delinquent after commencing work on the employer's project, the employer must terminate the subcontractor, and, if the employer fails to do so, the employer becomes liable for all delinquencies incurred on the job by the subcontractor 10 days after the subcontractor's name appears on the delinquency list. Paragraph 16 also permits the Union to picket or strike to enforce these provisions. (Pet. App. 15-16.)

In 1973, the trustees discovered that the Urban Pacific Construction Company, a firm that had signed a short form agreement with the Union and was on the delinquency list, was doing work for petitioners, who had notice of Urban Pacific's prior delinquencies at the time of contracting. The trust administrator and his attorney informed petitioners that, if the delinquencies were not paid, the administrator would notify the Union of its right to enforce paragraph

16 by economic action. Griffith refused to pay.[1] (Pet. App. 17-18, 76-78.)

2. Petitioners then filed charges with the Board alleging that paragraphs 15 and 16 of the MLA were an agreement to cease doing business with another employer in violation of Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and that the statements by the trust officials were a threat to strike for secondary purposes in violation of Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B) (Pet. App. 32-33). The Board held that the delinquency clause was a primary provision intended to preserve the negotiated benefits of the employees of employers under contract with the Union, and therefore dismissed the complaint based on petitioners' charges (*id.* at 48-53).

3. The court of appeals found that the clause was secondary and accordingly reversed. The court remanded the case to the Board with instructions to determine whether the clause was rendered lawful by the construction industry's limited exemption from "hot cargo" agreements. It further instructed the Board to consider whether, if the clause were unlawful, the Union was required to reimburse the employers for any monies that were contributed pursuant to the clause, and whether certain statements by the administrator and the trust counsel constituted a threat by agents of the Union to invoke the self-enforcement provisions of the clause. (Pet. App. 29-47.)

4. On remand, the Board held that the delinquency clause, with the exception of the self-help provision,

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[1] One of the petitioners and another contractor, no longer party to this case, paid approximately $8,000 of the Urban Pacific delinquency (Pet. App. 12 n.1, 76-77).

was within the scope of the construction industry proviso and that the payments made pursuant to its clause were therefore legal. The Board also concluded that the trust officials were not acting as agents of the Union in making the questioned statements. (Pet. App. 12-28.)[2]

In finding the delinquency clause lawful, the Board applied the interpretation of the construction industry proviso to Section 8(e) enunciated in *Woelke & Romero*,[3] in which it held that the proviso protected any agreement between qualified parties relating to the subcontracting of work performed at the jobsite which was sought or negotiated in the context of a collective bargaining relationship. The Board acknowledged (Pet. App. 20-21) that the effect of the clauses in *Woelke & Romero* "is to restrict a signatory employer's ability to subcontract jobsite work to subcontractors who do not have an agreement with the particular union involved," while the "effect of the instant clauses is to restrict a signatory employer's ability to subcontract jobsite work to em-

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[2] To remedy the limited violation found—*i.e.* the unlawfulness of the delinquency clause under Section 8(e) of the Act insofar as the clause authorized the Union to enforce its provisions through strike action—the Board ordered the Union to cease and desist from maintaining this portion of the clause (Pet. App. 23, 26). The court of appeals enforced the Board's order (*id.* at 7-8), and no issue concerning that aspect of the case is presented here.

[3] *Carpenters Local No. 944, United Brotherhood of Carpenters*, 239 N.L.R.B. 241 (1978), enforced, 654 F.2d 1301 (9th Cir. 1981), cert. granted *sub nom. Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (Oct. 5, 1981) (argued Mar. 3, 1982, together with *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *NLRB*, No. 80-1808, and *Oregon-Columbia Chapter, the Associated Contractors of America, Inc.* v. *NLRB*, No. 81-91).

ployers who are also signatory to an agreement with the * * * Union, but who are listed as delinquent in their contributions to the trust funds described above" (Pet. App. 20-21). However, it found that neither the express language of the proviso nor its legislative history indicated "the intention of Congress to protect *only* union signatory agreements at construction sites" (*id.* at 21; emphasis in original). Rather, it determined, the legislative history indicates that "the protection of the proviso may be applied to contract clauses with secondary objectives concerning jobsite work regardless of the precise relationship between the general contractor and the subcontractor" (*id.* at 22, referring to 105 Cong. Rec. 17900 (1959) (statement of Senator Kennedy)). The Board concluded (Pet. App. 22): "Keeping in mind the special nature of the construction industry and the close community of interest that exists there, we find the requirement imposed by the disputed clauses that the general contractor not subcontract work to delinquent subcontractors is a legitimate interest protected by the proviso."

5. The court of appeals upheld the decision of the Board and enforced its order (Pet. App. 1-11). Respecting the delinquency clause, the court stated (*id.* at 6):

> In *Pacific Northwest* v. *NLRB*, 654 F.2d 1301 (9th Cir. 1981) this court, sitting en banc, held that a Master Labor Agreement containing a union signatory clause requiring an employer to subcontract only to subcontractors who employed members of a particular union was within the scope of the construction industry proviso. The court focused on the unique nature of the construction industry, where short-term hiring and

> the extensive use of subcontractors make it difficult to define the primary bargaining unit and serve to create a community of interests among all workers at the jobsite. The court rejected the position advocated here by [the contractors] that the 8(e) proviso was intended solely to prevent jobsite friction between union and nonunion workers. Instead, it adopted the view that where a collective bargaining relationship exists, an agreement which serves the community of interests at the jobsite is permitted. [654 F.2d at] 1318-1322. [Additional citations omitted.]

The court concluded (Pet. App. 6-7) that paragraphs 15 and 16 of the MLA "serve the communal interests at the jobsite" and thus were within the Section 8(e) proviso. Rejecting the contractors' argument that the clauses are unrelated to that community of interests because trust fund delinquencies may be unassociated with the general contractor's jobsite, the court observed (Pet. App. 7) that the hiring of a subcontractor who is delinquent in his trust fund payments could lead to a strike by the subcontractor's employees, with a resulting "dislocation at the jobsite" of the type "that the construction industry proviso was intended to prevent[,]" and that "because contributions to the pension system are pooled into one account, the delinquency of the subcontractor affects the welfare, through the pension benefits, of all employees at the jobsite."

ARGUMENT

1. The basic issue presented by the petition (comprising Questions 1 and 2) is whether the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), privi-

leges a clause in a collective bargaining agreement that bars the subcontracting of construction site work to firms delinquent in their obligations to trust funds benefiting construction employees, and further, that requires contractors who *do* subcontract to an identified delinquent employer to assume responsibility for that employer's accrued obligations to the trust funds. Petitioners acknowledge (Pet. 14-18) that the answer to this question turns on the purpose of the proviso—whether it was intended merely to serve the interests of the prime contractor's employees on particular jobsites where they may be working along with the offending employer's employees (as petitioners contend), or whether it was intended to serve the broader purpose of protecting the contract benefits which the union negotiated for the pool of workers that it represents (as the Board and the court below held). Petitioners further acknowledge (Pet. 12) that the question as to the scope of the construction industry proviso is presented in *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798, and the two related cases, Nos. 80-1808 and 81-91, which were argued March 3, 1982 (see page 5, note 3).[4] In these circumstances, it would be appropriate for the Court to defer consideration of the present petition until a decision is rendered in Nos. 80-1798,

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[4] Although *Woelke & Romero* and the related cases involve union signatory subcontracting clauses—*i.e.*, clauses barring the subcontracting of jobsite work to firms not under contract with particular unions—both the Board and the court below made clear (pages 5-7, *supra*), that the same reasons that would sustain the validity of those clauses would also sustain the validity of the fringe benefit delinquency subcontracting clause involved here.

80-1808, and 81-91, and then dispose of the petition in accordance with that decision.

2. The petition states two additional questions (Pet. i), one of them an issue petitioners are now barred from raising and the other a substantial evidence question that petitioners do not support with argument in the body of their petition.

The question whether the illegal self-enforcement provision in the collective bargaining agreement is, without more, a proper basis for granting a reimbursement remedy (Pet. 20-22)—was never specifically raised before the Board or the court below.[5] Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioners from raising this issue now. *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). In any event, there is only one decision arguably supporting petitioners, *Joint Council of Teamsters No. 42* v. *NLRB*, No. 80-7455, *et al.* (9th Cir. Dec. 21, 1981) (remanding with directions that the Board either grant a reimbursement remedy for the Section 8(e) violation there found, notwithstanding the absence of proof that illegal coercion was used to enforce the unlawful agreement, or show cause why such a remedy should not be granted), and that case was decided by a different panel of the same circuit that decided this case. The possibility of an

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[5] Previously, petitioners had contended (C.A. Br. 14-19) that they were entitled to a reimbursement remedy because the contractors who made payments to the funds in order to cure the Urban Pacific delinquency did so as a result of threats by the funds' representatives that the Union would exercise its rights under the self-enforcement provisions to strike them. The fund representatives, petitioners had argued, were acting as agents of the Union in making the statements in question (*id.* at 14-16).

eventual intra-circuit conflict on this question is not a basis for obtaining review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

The fourth issue included in petitioners' "Question Presented" (Pet. i.)—whether the court of appeals erred in failing to find that the Union, through the trust funds, threatened, coerced, and restrained petitioners within the meaning of Section 8(b)(4)(B) of the Act—essentially challenges the Board's finding, upheld by the court below, that there is no evidence that the funds' representatives were acting as agents of the Union (Pet. App. 8-10, 24-25). This issue appears in the body of the petition only in a one-sentence footnote that rephrases it in different terms (Pet. 21 n.18), and it is not supported by argument or citations to any authority. Because the issue, moreover, involves a factual finding sustained by the court of appeals, it does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798, and related cases (Nos. 80-1808 and 81-91). Questions 1 and 2 stated in the petition should be disposed of in accordance with that decision, and certiorari should, in any event, be denied as to Questions 3 and 4.

Respectfully submitted.

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MARCH 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 370334 050